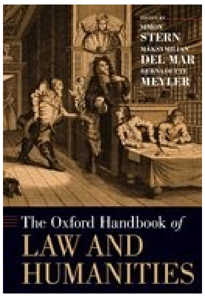

The Oxford Handbook of Law and Humanities

Simon Stern (ed.) et al.

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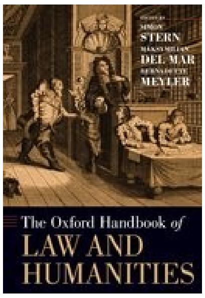

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About the Editors

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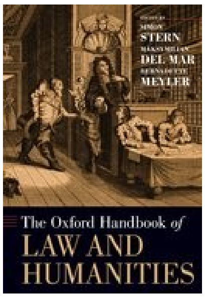
Simon Stern teaches law and English at the University of Toronto. His research focuses on the evolution of legal doctrines and methods in relation to literary and intellectual history. Recent and forthcoming publications include articles and book chapters on legal fictions, obscenity, copyright, criminal fraud, the place of narrative in law, and methodology in legal scholarship. He is co-editor, with Robert Spoo, of the *Law and Literature* series for Oxford University Press.

Maksymilian Del Mar is Professor of Legal Theory at the School of Law, Queen Mary University of London. His primary research interests lie in legal reasoning and legal education (especially rhetoric, imagination, and emotion), in historical jurisprudence, and in transnational and global legal theory. His monograph, *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication*, is forthcoming with Hart/Bloomsbury in early 2020. He edits the *Law in Context* series for Cambridge University Press.

Bernadette Meyler is Carl and Sheila Spaeth Professor of Law and Professor (by Courtesy) of English at Stanford University. She works on constitutional law and theory as well as law and the humanities. Her book *Theaters of Pardoning* (Cornell University Press, 2019) draws on dramatic, political, and legal sources to assess the evolution of the pardon power and its relationship with sovereignty in seventeenth-century England. She is also the co-editor of *New Directions in Law and Literature* (Oxford University Press, 2017) and many articles in law reviews and peer-reviewed journals.



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About the Contributors

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Gregory Ablavsky
is Associate Professor of Law at Stanford Law School. His work on law and relations between Native nations and the United States has appeared in the *Yale Law Journal, Stanford Law Review*, and *Duke Law Journal*, and is forthcoming in the *Journal of American History*. His book *Federal Ground: Law, Sovereignty, and Property in the Early U.S. Territories*, is under contract with Oxford University Press.

Elizabeth S. Anker
teaches in the English Department and Law School at Cornell University. Her books include *Fictions of Dignity: Embodying Human Rights in World Literature* (Cornell University Press, 2012) and the edited collections *Critique and Postcritique* (with Rita Felski, Duke University Press, 2017) and *New Directions in Law and Literature* (with Bernadette Meyler, Oxford University Press, 2017). She edits the book series “Corpus Juris: The Humanities in Politics and Law” (with Cornell University Press) and is currently writing two books, *On Paradox: The Claims of Theory* and *Our Constitutional Metaphors: Law, Culture, and the Management of Crisis*.

Carolin Behrmann
is leading the international research group “The Nomos of Images: Manifestation and Iconology of Law” at the Institute for Art History, Max Planck Institute, in Florence, Italy. After her studies in Tübingen, Bologna, and Berlin she worked and lectured at the Institute of Art and Visual Studies at Humboldt University in Berlin. She completed her PhD in art history with a designated emphasis on legal history. Her book *Tyrant and Martyr: Images and the History of Ideas of the Law Around 1600* (de Gruyter, 2015) analyzes the notion and presence of images in the history of legal ideas with a focus on the sixteenth and seventeenth centuries. Her scholarship involves the analysis of visual normativity from early modern to contemporary art, as well as the use of images in pedagogical and political contexts.

Rabia Belt
is Associate Professor at Stanford Law School and Professor of History (by Courtesy) at Stanford University. She is a legal historian who examines the relationship between people with disabilities and citizenship. She is at work on a book manuscript tentatively titled *Disabling Democracy in America: Disability, Citizenship, Suffrage and the Law, 1819–1920*. Rabia holds an AB in Social Studies from Harvard

College, a JD from the University of Michigan Law School, and a PhD in American Culture from the University of Michigan.

Noa Ben-Asher
is Professor of Law in the Elisabeth Haub School of Law at Pace University where she teaches family law, torts, and gender, law, and sexuality. Professor Ben-Asher is a graduate of Bar-Ilan University School of
p. xii Law (LLB) and NYU School ↳ of Law (LLM, JSD). She writes about a range of issues at the intersection of law, humanities, and critical theory, including gender, sexuality, jurisprudence, emergency powers, and the culture wars.

Andrew Benjamin Bricker
is Assistant Professor of English Literature in the Department of Literary Studies at Ghent University, in Belgium, and a Senior Fellow at the Andrew W. Mellon Society of Fellows in Critical Bibliography at the Rare Book School at the University of Virginia. His research focuses on the relationship between law and literature, especially during the early modern period and the eighteenth century. He is currently finishing a book about satire and the development of defamation law titled *Libel and Lampoon: Satire in the Courts, 1670–1792*.

Khiara M. Bridges
is Professor of Law at University of California Berkeley School of Law. Her scholarship concerns race, class, reproductive rights, and the intersection of the three. She is the author of *Reproducing Race: An Ethnography of Pregnancy as a Site of Racialization* (University of California Press, 2011), *The Poverty of Privacy Rights* (Stanford University Press, 2017), and *Critical Race Theory: A Primer* (Foundation Press, 2019).

Ari Z. Bryen
is Assistant Professor in the Department of History and the Program in Classical and Mediterranean Studies at Vanderbilt University, and Assistant Professor (by Courtesy) in the Vanderbilt Law School.

Bennett Capers
is Stanley A. August Professor at Brooklyn Law School. His academic interests include the relationship between race, gender, culture, and criminal justice, and he is a prolific writer on these topics. His articles and essays have been published or are forthcoming in leading law reviews, including the *California Law Review, Columbia Law Review, Michigan Law Review, NYU Law Review*, and the *UCLA Law Review*. He is an editor of *Critical Race Judgments: Rewritten U.S. Court Opinions on Race and Law* (forthcoming from Cambridge University Press) and author of *The Prosecutor's Turn* (forthcoming from Metropolitan Books).

Hillary Chute
is Distinguished Professor of English, and Art + Design, at Northeastern University. Her books include *Graphic Women: Life Narrative and Contemporary Comics* (Columbia University Press, 2010), *Outside the Box: Interviews with Contemporary Cartoonists* (University of Chicago Press, 2014), *Disaster Drawn: Visual Witness, Comics, and Documentary Form* (Harvard University Press, 2016), and *Why Comics? From Underground to Everywhere* (HarperCollins, 2017). She is also Associate Editor of Art Spiegelman's *MetaMaus* and co-editor of *Comics & Media: A Critical Inquiry Book.* She is a columnist writing on comics and graphic novels for the *New York Times Book Review*.

Donald R. Davis, Jr.
is Professor of Sanskrit and Indian Religions and Director of the South Asia Institute at the University of Texas at Austin. His recent publications include (with Patrick Olivelle) *Hindu Law: A New History of*
p. xiii *Dharmaśāstra* (Oxford ↳ University Press, 2018) and *The Dharma of Business: Commercial Law in Medieval India* (Penguin, 2017).

Sarah Deer,
a 2014 MacArthur Fellow, is a citizen of the Muscogee (Creek) Nation. Currently Professor of Women's, Gender, and Sexuality Studies at the University of Kansas, Deer is also Chief Justice for the Prairie Island Indian Community Court of Appeals. Professor Deer has received recognition from the US Department of Justice and the American Bar Association for her work to end violence against Native people.

Doron Dorfman
is Associate Professor at Syracuse University College of Law. He conducts empirical research to explore a variety of issues in disability law and health law. Doron holds a JSD and a JSM from Stanford Law School, a BA in Communications, an LLB, and an LLM from the University of Haifa.

Rex Ferguson
is Senior Lecturer in English Literature at the University of Birmingham (UK). He is the author of *Criminal Law and the Modernist Novel* (Cambridge University Press, 2013) and has published in journals such as *Textual Practice, New Formations, Law and Humanities*, and *Critical Quarterly*.

John Frow
is Professor of English at the University of Sydney. He is the author of numerous books and articles including *Marxism and Literary History* (1986), *Time and Commodity Culture* (1997), *Genre* (2006/2015), and *Character and Person* (2014). *On Interpretive Conflict* will appear in 2019.

Andrew Gilden
is Assistant Professor of Law at Willamette University College of Law, where he teaches copyright, Internet law, property, and trusts & estates. Professor Gilden writes about a range of issues at the intersection of law, culture, and technology, including intellectual property, gender and sexuality in cyberspace, outsider speech, and the inheritance of digital assets. He holds an AB in Anthropology and Economics from Brown University and a JD from Georgetown University Law Center.

Valérie Hayaert
is a classicist, historian, and humanist researcher of the early modern European tradition. Her particular interest lies in the *mens emblematica*, the humanist lawyers' invention of woodcut depictions of legal and theological themes, in the tradition of playful seriousness or *serio ludere*. Her first book, *"Mens emblematica" et humanisme juridique*, was published in 2008. Her subsequent work looked at the aesthetics of justice in courthouses of the early modern period until today. She is currently a Research Associate at the IHEJ (Paris) and a Fellow at the Käte Hamburger Kolleg "Law as Culture" at the University of Bonn.

Eric Heinze
is Professor of Law and Humanities at Queen Mary University of London. His books include *Hate Speech and Democratic Citizenship* (Oxford University Press, 2016); *The Concept of Injustice* (Routledge, 2013); *The Logic of Constitutional Rights* (Ashgate, 2005); *The Logic of Liberal Rights* (Routledge, 2003); *The Logic of Equality* (Ashgate, 2003); *Sexual Orientation: A Human Right* (Nijhoff, 1995); and *Of Innocence and Autonomy: Children, Sex and Human Rights* (editor, Ashgate, 2000). His articles p. xiv ↳ include pieces in *Oxford Journal of Legal Studies, Harvard Human Rights Journal, Modern Law Review, Ratio Juris, Legal Studies, Michigan Journal of International Law, Canadian Journal of Law and Jurisprudence*, and *Journal of Social & Legal Studies*.

Timothy Hyde
is Associate Professor in Architectural History and Theory at the Massachusetts Institute of Technology. His research focuses on political dimensions of architecture from the eighteenth century to the present, with a particular attention to relationships of architecture and law. He is the author of *Ugliness and*

Judgment: On Architecture in the Public Eye (Princeton University Press, 2019) and *Constitutional Modernism: Architecture and Civil Society in Cuba, 1933–1959* (University of Minnesota Press, 2012).

Hyo Yoon Kang
teaches intellectual property at the University of Kent, Canterbury (UK). She holds a PhD in Law from the European University Institute and a LLM. and BSc from the London School of Economics and Political Science. She was a Postdoctoral Research Fellow at the Max Planck Institute for the History of Science. Her research interests are in knowledge techniques and transmissions, construction of value and valuation practices, notions of novelty, and creativity. She co-leads the AHRC Legal Materiality research network (legalmateriality.wordpress.com) with Dr. Sara Kendall and is Partner to the ERC research project on Patents as Scientific Information (passim.se).

Tal Kastner
is currently Acting Assistant Professor at NYU School of Law. She writes about contract and the intersection of law, culture, and society, among other topics. She holds a PhD in English from Princeton University and a JD from Yale Law School and has practiced as a transactional attorney.

Suzanne Keen
works on narrative empathy. Her work draws on the novel, narrative theory, neuroscience, developmental and social psychology, and cognitive and emotion science. Her books include *Thomas Hardy's Brains: Psychology, Neurology, and Hardy's Imagination* (2014), *Empathy and the Novel* (2007), *Narrative Form* (2003, rev. and expanded 2nd ed., 2015), *Romances of the Archive in Contemporary British Fiction* (2001), and *Victorian Renovations of the Novel* (1998). Educated at Harvard and Brown Universities, she serves as VPAA and Dean of Faculty at Hamilton College, where she is Professor in the Department of Literature and Creative Writing.

Sarah Keenan
works at Birkbeck Law School, where she is co-director of the Centre for Research on Race and Law. Her research and teaching are at the intersection of legal and political theory, geography and post-colonial studies. Her book *Subversive Property: Law and the Production of Spaces of Belonging* (Routledge, 2015) engages with legal geography and feminist and critical race theory to offer an empirically grounded conceptualization of property as belonging in space.

Sara Kendall
is Senior Lecturer in International Law at the University of Kent, where she also serves as co-director for the Centre for Critical International Law. She completed her PhD at the University of California at Berkeley in the interdisciplinary rhetoric program, followed by a research position in international law at the University ↳ of Leiden. She has also taught in political science at the University of Amsterdam. Her research considers the discursive forms and material practices of international law and global governance, and she has published on topics in international criminal law, international humanitarian law, and rule of law interventions.

Marett Leiboff
is Associate Professor in the School of Law at the University of Wollongong (Australia). She is a jurisprudent who has been widely recognized for her work in the development of theatrical jurisprudence, based on her non-legal background in theater studies. This new jurisprudence uses the insights of theater theory and practice to interrogate what constitutes the formation of careful and considered legal interpreters able to notice when law reaches beyond justice, using history, biography, and different cultural forms to understand what happens when lawyers interpret legal texts, how non-legal experience affects that interpretation, and what this means for legal integrity. Her book Towards a Theatrical Jurisprudence was published by Routledge in 2019.

Henrike Manuwald
is Professor of Medieval German at the Georg-August-Universität Göttingen (Germany). Her research covers the literature and the manuscript culture in German-speaking countries in the medieval period. She has a particular interest in the relationship between law and literature, documented, most recently, by a monograph on depictions of the trial of Jesus in medieval narratives (2018). She has also worked on legal images, especially in manuscripts of the *Saxon Mirror*.

Renisa Mawani
is Professor of Sociology and recurring Chair of the Law and Society Program at the University of British Columbia. She works in the fields of critical theory and colonial legal history and has published widely on law, colonialism, and legal geography. She is the author of two books, *Colonial Proximities* (2009) and *Across Oceans of Law* (2018). With Iza Hussin, she is co-editor of "The Travels of Law: Indian Ocean Itineraries" published in *Law and History Review* (2014); with Antoinette Burton, she is co-editor of *Animalia: An Anti-Imperial Bestiary of Our Times* (under contract with Duke University Press).

John P. McCormick
is Professor of Political Science at the University of Chicago, and the author, most recently, of *Reading Machiavelli: Scandalous Books, Suspect Engagements and the Virtue of Populist Politics* (Princeton University Press, 2018).

Tracy McNulty
is Professor and Chair of Comparative Literature at Cornell University. She is the author of *The Hostess: Hospitality, Femininity, and the Expropriation of Identity* (Minnesota University Press, 2007) and *Wrestling with the Angel: Experiments in Symbolic Life* (Columbia University Press, 2014). Currently she is completing a manuscript on the unconscious transmission of political acts, tentatively titled *Emancipation by Relay: Freud in History*. She has written about law in several different contexts, including Mosaic law traditions, law and constraint, sovereign decision, and contributions to legal theory by thinkers including Alain Badiou, Walter Benjamin, Immanuel Kant, and Jacques Lacan.

Panu Minkkinen
is Professor of Jurisprudence at the University of Helsinki. In addition to themes at the intersection of law and the humanities such as literature and ↳ the visual arts, Minkkinen's research interests include the philosophical and historical origins of law in the human sciences as well as law's affiliations with contemporary political theory.

Subha Mukherji
was educated in Calcutta, Oxford, and Cambridge. She teaches at the University of Cambridge and is Principal Investigator on the ERC-funded interdisciplinary project *Crossroads of Knowledge in Early Modern England: The Place of Literature*. She is the author of *Law and Representation in Early Modern Drama* (Cambridge University Press, 2006), General Editor of the series *Crossroads of Knowledge in Early Modern Literature* (Palgrave Macmillan), and editor or co-editor of five critical volumes and three forthcoming collections. Most recently, she edited and contributed to *Blind Spots of Knowledge in Shakespeare and His World* (Medieval Institute Publications, 2019). She is currently writing a monograph on *Knowing Encounters in Early Modern Literature.*

Sherally Munshi
is Associate Professor of Law at Georgetown Law. Her current scholarship examines the relationship between immigration law and white nationalism from postcolonial and comparative perspectives.

Julie Stone Peters
is H. Gordon Garbedian Professor of English and Comparative Literature at Columbia University, where she teaches on a range of topics in the humanities, from drama, film, and media to law and culture. Her

most recent book is *Theatre of the Book: Print, Text, and Performance in Europe 1480–1880*. She is currently working on a historical study of legal performance, theatricality, and spectatorship.

Heikki Pihlajamäki
is Professor of Comparative Legal History at the University of Helsinki. His research focuses on early modern and contemporary legal history. Pihlajamäki's research is comparative, and he has written on the legal history of Scandinavia, Europe, and Latin America. Thematically, his research comprises historical aspects of procedural, criminal, private, and administrative law, in addition to which he has published on the history of the legal profession, and theory of legal history and comparative law.

Camille Gear Rich
is Professor of Law and Sociology at USC Gould School of Law and has been a member of the faculty for eleven years. Her teaching interests include constitutional law, family law, children and the law, and the First Amendment. She is the founder and Director of PRISM: The USC Initiative for the Study of Race, Gender, Sexuality and the Law. Rich is most widely known for her research on identity-formation structures in law that shape race, class, gender, and sexuality. Her research integrates feminist legal theory, critical race theory, masculinity studies, and whiteness studies. She is currently working on a book on race relations in the Trump era.

Justin Richland
is Associate Professor in the Department of Anthropology at the University of California-Irvine and Faculty Fellow at the American Bar Foundation. His publications have appeared in several leading peer-reviewed outlets; he has also authored two books on indigenous law, including *Arguing with Tradition: The Language* ↳ *of Law in Hopi Tribal Court*. In 2016, he was named a J. S. Guggenheim Fellow and an adjunct curator of North American Anthropology at the Field Museum. He also serves as an Associate Justice on the Hopi Appellate Court.

Annelise Riles
is Associate Provost for Global Affairs, Executive Director of the Buffett Institute for Global Studies, and Professor of Law and Anthropology at Northwestern University. Her scholarship spans a variety of areas including human rights, cultural differences, and the regulation of global financial markets. She founded and directs Meridian-180, a multilingual forum for transformative leadership. She received an AB from Princeton University's School of Public and International Affairs, a MSc in Social Anthropology from the London School of Economics, a JD from Harvard Law School, and a PhD in Social Anthropology from the University of Cambridge.

Stephen Robertson
is Professor of History and Director of the Roy Rosenzweig Center for History and New Media at George Mason University. He has published extensively on the history of sex crimes in the United States, including *Crimes Against Children: Legal Culture and Sexual Violence in New York City, 1880–1960* (2005). With collaborators at the University of Sydney, he created *Digital Harlem*, a spatial analysis of everyday life in the 1920s, which won the American Historical Association's 2010 Rosenzweig Prize for Innovation in Digital History. His current research explores private investigation in the United States from the Civil War to World War II.

Julia Simon-Kerr
is Professor of Law at the University of Connecticut School of Law. Her research focuses on how culture and history guide the law's approach to credibility and lying. Professor Simon-Kerr also writes on law and literature, education law, and gender and the law.

Norman W. Spaulding

is Nelson Bowman Sweitzer and Marie B. Sweitzer Professor of Law at Stanford Law School. He has published widely in the field of law and humanities, concentrating on the relationship between mass atrocity, collective memory, and legal interpretation.

Ellen Spolsky
is Professor Emerita at Bar-Ilan University (Israel). She is a literary theorist who explores the uses of cognitive theories for literary and cultural history. Her books include *Gaps in Nature: Literary Interpretation and the Modular Mind* (1993), *Satisfying Skepticism: Embodied Knowledge in the Early Modern World* (2001), *Word vs Image: Cognitive Hunger in Shakespeare's England* (2007), and *The Contracts of Fiction: Cognition, Culture, Community* (2015). She has published articles on Shakespeare and on cognitive literary theory, including the influential "Darwin and Derrida: Cognitive Literary Theory as a Species of Post-Structuralism" (*Poetics Today* 23, no. 2 (2002)), arguing that both the survival of species and the emergence of sharable verbal meaning depend on fit in context.

Robert Spoo
is Chapman Distinguished Professor at the University of Tulsa College of Law. He was formerly editor of the *James Joyce Quarterly* and has published extensively on modern authors, law and literature, and p. xviii copyrights and the public ↳ domain. His book *Without Copyrights: Piracy, Publishing, and the Public Domain* (Oxford University Press, 2013) was praised in *The Nation, London Times Literary Supplement, American Historical Review*, and other venues. His latest book *Modernism and the Law* (Bloomsbury Academic, 2018) was supported by a Guggenheim Fellowship. He is co-editor, with Simon Stern, of the *Law & Literature* series with Oxford University Press.

Nomi M. Stolzenberg
is a graduate of Harvard Law School and Yale College. She holds the Nathan and Lilly Shapell Chair in Law at the University of Southern California law school. At USC, she helped to establish the USC Center for Law, History and Culture. She has written many articles on the subjects of law and liberalism and law and religion, and has investigated the related topics of legal fictions and facts on the ground, with a particular interest in legal fictions of paternity and property. Her work traverses the fields of political theory and the history of political thought, feminist theory, law and literature, and law and psychoanalysis.

Christopher Tomlins
is Elizabeth Josselyn Boalt Professor of Law at the University of California, Berkeley, and an Affiliated Research Professor of the American Bar Foundation, Chicago. His research concentrates on Anglo-American legal history from the sixteenth to the twentieth centuries. His most recent books are *Searching for Contemporary Legal Thought* (Cambridge University Press, 2017), co-edited with Justin Desautels-Stein, *The Oxford Handbook of Legal History* (Oxford University Press, 2018), co-edited with Markus Dubber, and *In the Matter of Nat Turner: A Speculative History* (Princeton: Princeton University Press, 2020).

Mariana Valverde
has most recently written *Chronotopes of Law: Jurisdiction, Scale and Governance* (Routledge, 2015) and *Michel Foucault* (Routledge, 2017). For the past few years her main research focus has been the governance of urban development, especially infrastructure public-private partnerships.

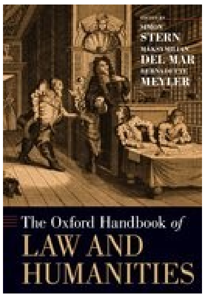
Cristina Vatulescu
is Associate Professor of Comparative Literature at New York University. Her book, *Police Aesthetics: Literature, Film and the Secret Police* (Stanford University Press, 2010), a study of the relationships between cultural and policing practices in twentieth-century Eastern Europe, won the Heldt Prize and the Choice Outstanding Academic Title Award. She is also co-editor of *The Svetlana Boym Reader* (Bloomsbury, 2018) and a *Perspectives on Europe* special issue on "Secrecy" (2014). Her articles have appeared in *Law &*

Literature, diacritics, Comparative Literature, Poetics Today, and the *Brooklyn Rail.* Cristina is currently working on a project entitled Silences, Fictions, Etc.: The Challenges of Reading an Archival Revolution.

Christopher N. Warren
is Associate Professor of English at Carnegie Mellon University. His research spans law and literature, early modern studies, print culture, the history of political thought, and digital humanities. Warren is the author of *Literature and the Law of Nations, 1580–1680* (Oxford University Press, 2015), which won the 2016 Roland H. Bainton Prize for Literature. He is a member of the MLA's executive committee for 17th-century English, and his articles have appeared in journals including ↳ *Humanity, Law, Culture, and the Humanities, The European Journal of International Law, English Literary Renaissance*, and *Digital Humanities Quarterly*.

Steven Wilf
is Anthony J. Smits Professor of Global Commerce at the University of Connecticut School of Law. A scholar of legal history and intellectual property law, he has published an array of books and articles on these subjects including *The Law Before the Law* (2008), *Law's Imagined Republic: Popular Politics and Criminal Justice in Revolutionary America* (2010), and *Fashioning Global Patent Cultures: Diversity and Harmonization in Historical Perspective* (with Graeme Gooday, 2019).

Daniel Williams
is Assistant Professor of Literature at Bard College. He specializes in nineteenth-century British literature and culture and also works on the literature of contemporary South and Southern Africa. His current book manuscript explores uncertainty as a phenomenon in the nineteenth-century British novel, understood in the context of developments in science, philosophy, and the law. His articles and reviews have appeared, or are forthcoming, in journals including *ELH, NOVEL, Studies in the Novel, Victorian Studies, Victorian Literature and Culture, Victorian Poetry, Nineteenth-Century Contexts, Modern Language Notes, Comparative Literary Studies, Genre, Anglia*, and *Safundi*. He is co-editing a special issue of *Poetics Today* on "Logic and Literary Form."



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Introduction

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THIS collection of new essays on law and humanities has been designed as a forward-looking one. We sought as much as possible to encourage the asking of questions still emerging, to provoke and stimulate embryonic debates, and to facilitate the forging of forms and ways of looking and connecting that are fragile and difficult because they are still so fresh and surprising. We thus advised our contributors to avoid encyclopaedic literature reviews and instead to bring their own subjectivity to bear: to articulate what they feel is most urgent, most interesting, most deserving of further work in law and humanities. And we are delighted with how our contributors have responded; we could only have hoped for, but never foreseen, such replies. There is an embarrassment of riches in this collection, offering unfamiliar takes on familiar concepts, methods or categories, or constructing novel forms and groupings. To name but a few of the connections that appear in this volume, contributors have explored the relations between

- Image, knowledge, and power
- Body, movement, and moral perception
- Space, voice, and face
- Genre, gesture, and emotion
- Archive, violence, and resistance
- Discourse, matter, and architecture
- Form, inequality, and narrative
- Market, identity, and faith
- Anecdote, abstraction, and normativity
- Memory, persuasion, and experiment
- Empire, criminalization, and indigeneity

Basking in the light of these contributions, the future of law and humanities is bright indeed.

p. xxii And yet, as forward-looking as we have attempted to be, we are of course very much aware that law and humanities, and humanities more generally, have a fascinating and contested history—indeed, many fascinating and contested histories. It has been more than an embarrassment for humanities scholars that while the history of the sciences and social sciences has flourished in the twentieth and twenty-first centuries, there has been little, until recently, to celebrate in the history of the humanities. Matters have improved of late, especially with the work of Rens Bod (and his *New History of the Humanities*) and the creation of a new journal in 2016, *History of the Humanities*.[1] Bod, in particular, has not only virtually established the field but also constructed it in such a way as to make it receptive to current trends in historiography, especially big history, and global and transnational history. For example, his history of linguistics begins with the Indian grammarian Panini, whose eight books of Indian grammar, composed between the seventh and fifth centuries BCE, not only became the basis of education in India for many centuries but had an enormous impact beyond, initially in China, then Persia, and eventually (much later) in Western Europe.[2]

The very scope of Bod's history raises, of course, the pressing question: just how should we think of the humanities when historicizing them? What holds them together, what are the common or at least overlapping denominators of the humanities? Bod's approach is to fasten on "humanistic material," i.e., on the study of "language, texts, music, literature, theatre, art and the past," and to identify the "methodological principles that have been developed and the patterns that have been found" in such studies. The patterns he looks for, and finds, vary from "inexact regularities" to "exact laws"—they include everything from "systems of grammar" to "systems of interpretation," or "laws in linguistics" or "laws of harmony in music."[3] The result is truly impressive and groundbreaking. And yet one wonders whether a history of the humanities is appropriately based on, or anchored by, sensitivity to patterns, rules, and systems. One also wonders whether limiting the humanities to the study of "humanistic material" captures the breadth of the humanities, especially their interests in material of all kinds. After all, basing a definition of the humanities on "humanistic material" begs the question of what is meant by "humanistic."

So here is another possibility, and one which of course would need to be tested and challenged, not only by looking back but also by looking forward (for instance, as per the contributions in this collection): that to practice the humanities is to approach, with certain attitudes and sensitivities, a multitude of practices of making (of making things, making meaning, making sense), including relations between those practices of
p. xxiii making and the values that may be at stake in such practices and their relations to each other. ↳ A key aspect of this model turns on what is meant by "attitudes and sensitivities." It would be dangerous of course (this being in itself a lesson of the humanities) to attempt an exhaustive account of such attitudes and sensitivities, but here are three:

- Sensitivity not so much (and certainly not only) to the regular and the patterned, but instead to the irregular and the unpatterned. The humanities have, surely, a long and vital tradition in helping us see the unpredictability of human behavior, i.e., an interest precisely in its resistance to description by reference to rules, systems and patterns. One can put this in different ways: e.g., an attitude of respect for, or a responsiveness to, the anomaly, to particularity, to idiosyncrasy. The humanities, one might say, have been marked by their thirst for subjectivities and experiences that are difficult or impossible to universalize, generalize, or even recognize.

- Sensitivity to the blind spots in our abilities to sense who is in danger, suffering, or vulnerable. The humanities have a gift of tapping us on the shoulder and pointing to the limits of our knowledge: to what we haven't seen or can't see, and, very importantly, to how we can't see everything at once. There is, then, a rich reflexivity at the heart of the humanities. Such reflexivity offers vital reminders of the contingency and arbitrariness of even our most prized concepts and methods. There is not only humility in such self-awareness but also great energy: it spurs us to keep looking, and to try harder—in particular, to keep trying to look and listen better to those who are or may be (soon or in the distant future) in danger or in need.

- Sensitivity to the apparently superficial, superfluous, unnecessary, insufficient, marginal, transitional, or by-the-by. One of the great virtues of the humanities has been to pay attention to that which other approaches discard as insignificant or too obvious. The humanities might be understood as arts of salvage; of rescuing that which has been seen or might be seen to be useless, incapable of being instrumentalized or made profitable. The humanities look, with delicacy and care, through the garbage bins of history.

Of course, these attitudes and sensitivities relate to each other. They overlap with and feed off each other, and they work together. And they are brought to bear, as mentioned above, on a multitude of practices of making: making things, making meaning, making sense. This multitude of practices includes, but goes considerably beyond, the "humanistic material" identified by Bod. It includes, for example, ephemeral modes of expression (such as sighs or winks), and not only practices of representation that are enduring or have a long-lasting impact. There is an interest here in all things human, and indeed in forever questioning what the boundaries of the human are taken, at any one place and time, to be. And, importantly, "making" is not taken to be mean merely "working" but includes, for example, playing; after all, we make plenty of meaning by playing together.

Finally, the above attitudes and sensitivities are brought to bear not only on practices and making and their p. xxiv relations with each other but also on the values at stake in such ↳ practices and relations. In other words, the attitudes and sensitivities of the humanities help articulate the ethics and politics of practices of making and relations among those practices. They help us to see the many ways such practices involve domination and exclusion, and, in keeping with the spirit of those attitudes and sensitivities, they remind us that we may never have practices of making that do not dominate or exclude others. Such, after all, is our finitude, which is both precious and wonderful, but also has its dark sides. We are human, all too human.

"Law has always been a part of the humanities"; "Now, more than ever, law needs the humanities." These two refrains will be immediately familiar to anyone who has been drawn to the scholarship on law's relations to history, literature, art, and philosophy—and the contributions to this collection attest, in various ways, to the truth of both assertions. Nevertheless, given the assumptions they usually reflect, neither of these statements aligns with the understandings of law, the humanities, and their interrelations that inform this *Handbook*. Although there are significant exceptions (particularly in recent decades), discussions of the law's deep roots in the humanities, and its need of the humanities, have most often associated law with legal doctrines and rhetoric, in particular, and have looked to the humanities for representations of legal actors and dilemmas, and for ethical resources that can shed light on legal problems. Work that investigates those issues remains vitally important; however, we take the humanities to encompass not only history, literature, art, and philosophy but the whole range of fields that use interpretative methods to study creativity, expression, and the imagination. These include many fields—such as architecture, geography, book history, cognitive studies, science and technology studies, and performance studies—that influence, and are influenced by, legal concepts and methods, but that appear only sporadically, if at all, in law journals. This wide scope also embraces critical approaches—to racialization, sexuality, colonialization, materiality, affect and emotion, and disability, for instance—that cross traditional disciplinary boundaries. By bringing these perspectives to bear on law's artefacts and effects, the contributors to this collection have suggested numerous new paths for thinking about how law molds and fractures meaning, persons, collectivities, and aspirations.

We also understand law to cover a wider range of legalities than the ones typically evoked by the two statements and their alternative claims to an enduring past and a present exigency. Any effort to understand

the work of judges, legislators, lawyers, and litigants must, of course, engage with the bureaucratically and forensically manufactured products that help to frame their arguments (such as constitutions, statutes, regulations, doctrines, and cases), along with the rhetorical practices and theoretical concepts that animate and delimit all of these forms of expression and governance. However, to construe law in this fashion often has the result of sidelining other legal modes, including alternative dispute resolution and the various kinds of mediation and conciliation sometimes associated with it; negotiations conducted in the shadow of the
p. xxv law; the "low law" dispensed by magistrates and Justices of the Peace; law on the ground; ↳ popular constitutionalism; vigilante justice and other forms of self-help; the rules and constitutions created by nonce associations, such as groups of miners and prospectors, and utopian communities; "minor" jurisdictions such as the courts of conscience, piepowder courts, the Court of Chivalry, and the Courts of Love; the oracular pronouncements of sages and religious authorities; poetic justice; and the justice meted out by the autocrats of television courtrooms. Similarly, a focus on forensic adjudication and doctrine often has the effect of minimizing the materiality of legal forms and documents. By attending to these various legalities, we hope to show how law's humanistic aspects may be seen not only by studying rhetorical practices and ethical dilemmas but also by considering the many different ways in which law is bound up with problems of agency, epistemology, performance, power, trauma, space, and temporality (to name just some of the threads running through this *Handbook*). This expanded frame reveals numerous new and unexpected aspects of law's place within the humanities, as well as the law's need for concepts, theories, methods, and practices found in the humanities.

Finally, this way of exploring legal and humanistic questions opens up new ways of understanding the conjunction itself. Often, when scholars speak of studying law and the humanities, a question is hovering in the background, perhaps even in the foreground: what use does this enterprise serve? In its usual form, the question seeks to find out what legal problems the humanities can help to solve, and why the humanities can claim any privileged status in arriving at those solutions. Alternatively, if law is to play the subordinate role in the investigation, and provides the backdrop for research in the humanities, then what distinguishes the legal domain from any other professional domain that might be evoked to pursue this line of research? The chapters in this *Handbook*, rather than subordinating either term, show what occurs when we place legal ideas, forms, devices, methods, and sensibilities together with their correlates, cognates, variants, and antitheses in humanistic disciplines—the aim being not to solve a preformulated problem in either field but to pose new, otherwise unasked questions about the techniques, premises, and processes that make these various legalities accepted and disputed, and about the different registers (sober, cynical, comic, ironic) in which forensic and legalistic dispositions inform our creative efforts.

The *Handbook* is divided into four parts, to provide multiple points of entry for all readers. Part I takes up various theoretical approaches, introducing themes and ideas that reappear throughout the remainder of the volume. Part II dwells on keywords and concepts that straddle different fields in law and the humanities, highlighting questions that have long continued to fascinate scholars and suggesting directions for future research both within and among the fields they explore. Part III focuses on specific areas of law, showing how humanistic perspectives can reveal dimensions of each field that we miss if we restrict our attention to conventional doctrinal analysis. Finally, the Part IV turns to legal genres and forms (construing these terms broadly), examining the assumptions, conventions, potentialities, and affordances of these media. While the first two parts somewhat self-evidently foreground the theories and themes afforded by law and
p. xxvi humanities, or by law and the humanities to each other, it is worth dwelling in ↳ somewhat more detail on the aims of the final two parts of the *Handbook*, those pertaining to areas of law and legal genres.

Scholars of law and literature have called attention to legal genres at least since Robert Ferguson's 1990 essay "The Judicial Opinion as Literary Genre." In that succinct but seminal piece, Ferguson identified several distinguishing features of the judicial opinion and suggested the broader applicability of generic analysis within law.[4] Others have examined legal genres historically, analyzing the forms of the nineteenth-century case report or the sixteenth-century French letter of remission.[5] Despite this important work, legal scholarship has been slow to recognize the significance of genres and the particular ways in which genres affect how legal knowledge is produced and received.[6]

The final part of the *Handbook* aims to bring considerations of genre into greater prominence by showcasing a number of approaches to generic models. It likewise expands the compass of generic analysis beyond text to include the range of images and performances both produced by and treating law. As the pieces included here demonstrate, legal media may announce themselves as treatises (Wilf), case files (Vatulescu), or video (Capers), and be fruitfully analyzed as such. Alternatively, it is possible to reconstruct a legal event from a generic vantage point, emphasizing its status as a performance (Peters), or viewing it through the particular lens of a cultural genre such as comics (Chute).

Throughout these various contributions, certain common questions and themes emerge. Genres represent, as Steven Wilf notes, a form of "cultural practice." A genre's forgotten moment of emergence or transformation may tell us something about its legal role and significance, as Andrew Benjamin Bricker's chapter on case reports suggests. The intended audience—whether lay or legal, judicial or administrative—will shape the picture of a legal regime presented. The character of the language used within a particular genre, such as the repetitions of stock legal phrases in the boilerplate contract language that Tal Kastner treats, has implications for the genre's legal effect and social role. Newly emergent genres, such as the police video Bennett Capers treats, may produce impressions of reliability in excess of their capacity to deliver. Rather than viewing a particular genre as rigidly including or excluding, the tendency in this volume is toward permeable borders and family resemblances.

A legal event may not always address us in the form of a fixed genre, as Julie Stone Peters's contribution suggests. Instead, it is possible to approach such an occurrence—even one that happened in the distant past—as a performance, attempting to reconstruct its bodily and experiential dimensions. Law itself may, in p. xxvii turn, be asked to ↳ respond to a traumatic past, as discussed in Norman W. Spaulding's chapter, which encourages treating this past not by burying it or attempting to overturn it, but instead through a "disposition of living with, not after, trauma." Hillary Chute's contribution on comics further indicates how literary genres might approach similar traumatic occurrences and how aspects of their form, including the use of frames and relation to time, shape their engagement with human rights.

Assessing legal materials through the lens of genre allows us to view law neither, on the one hand, as a defined set of doctrines nor, on the other, an infinitely malleable instrument for implementing political preferences. Instead, law appears as a refractory composite of different forms, which present disparate views of their subject in accordance with their generic features and dispositions. By emphasizing aspects of genre, the *Handbook* attempts to demonstrate the significance of such analysis for legal studies as a whole.

The penultimate section of the *Handbook* brings humanistic approaches, broadly conceived, to bear on recognized substantive areas of law; far from being an optional add-on, humanistic approaches have the potential to fundamentally reframe the way in which we see central doctrinal areas of law such as evidence (Simon-Kerr), property (Keenan), and international law (Warren). Scholars trained in the humanities have, in recent years, helped to reshape conversations in their substantive fields in ways that draw implicitly on humanistic approaches. For example, in the area of copyright, Barton Beebe has demonstrated how indebtedness to American literary romanticism detrimentally influenced US conceptions of copyright at a crucial doctrinal moment in the early twentieth century and has suggested ways to repair the consequences of this turn going forward.[7] In the domain of bank regulation, Annelise Riles has relied on her ethnographic work on finance and financial actors to argue that problems with the legitimacy central banks arise from a culture clash between the expert culture of central bankers and that of the global publics invested in their activities.[8] Through this work, it becomes visible how humanistic approaches can play a valuable role in reconfiguring legal doctrine and regulatory policy rather than serving solely a critical function.

In that vein, Elizabeth S. Anker's contribution to this volume, taking inspiration from the post-critical turn in literary studies, suggests that we move beyond a simple dichotomy between critique and prescription in the area of human rights.[9] As Anker argues, approaches to human rights have often focused on the paradoxes they present, while frequently failing to present a way forward. She sees some law and humanities scholarship as falling into a similar trap and instead advocates for amalgamating critique and affirmation, both with respect to human rights and work in law and humanities. Other chapters of the *Handbook* indicate how a humanistic approach could adjust the temporal and geographical scope of inquiry p. xxviii within particular substantive areas of law and ↳ thereby shed new light on their constitutive problems and potential solutions. For example, addressing immigration, Sherally Munshi powerfully demonstrates the contingency of contemporary conceptions of borders through placing the contemporary nation state within the geography and genealogy of empire. Turning to intellectual property, Andrew Gilden argues for the capacity of queer theory to open up the classical liberal conceptions underlying contemporary US intellectual property regimes and furnish new sources for thinking about creativity, such as through the performative turn advanced by Judith Butler, among others.[10]

Focusing in on particular substantive areas of law also highlights the potential for law as a field to enable important conversations about methodology among differing disciplines affiliated with the humanities. Law thus functions as a site for the convergence of disciplinary approaches upon a shared set of topics, and allows for the crystallization of debates over methods through engagement with a common subject matter. For example, the subjects tackled by the *Handbook* furnish opportunities for staging disparate approaches to history. In this collection alone, scholars engage the pasts of law from the perspectives of legal history, performance, genealogy, international law, political theory, the history of political thought, art history, and digital humanities, among others. As late German historian Reinhart Koselleck's work often suggested, different ways of treating history do not necessarily fall within a hierarchy of value but instead cast light upon each other. Thus Koselleck derived new insights from thinking general history alongside legal history as well as natural history.[11] Christopher N. Warren's discussion of international law in this volume similarly inaugurates what he calls a "trilateral methodological conversation among literary critics, historians, and scholars of international law," positing a new potential for "quasi-literary legal history" in international law, a form of history that could "creat[e] 'cross-temporal community' " and "mov[e] meaning through time." Substantive areas of law can thereby furnish a site for methodologies to collide and potentially rub off on each other, rendering law a powerful arena for interdisciplinary encounters within the humanities.

To compose an introduction to a collection as rich and varied as this one is difficult; no one framing, no one editorial strategy, no single or even collective vision can do it justice. It leaks and overspills, and cannot be contained, as perhaps is always the case with work in the humanities. What we have sought to do above is merely suggest a few ways in. Readers will no doubt discover more, of their own making. We offer up this collection, then, in the spirit of experiment, as a collective invitation to further conversations and more experiments.

Notes

[1] Most of the chapters in this *Handbook* first took shape as papers presented at two conferences on Law and the Humanities, held at Stanford Law School on May 18–19, 2018, and at the School of Law at Queen Mary University of London on June 14–15, 2018. We are grateful to both institutions—and to former Stanford Law School Dean Elizabeth Magill—for their support.

Rens Bod, *New History of the Humanities* (Oxford: Oxford University Press, 2013); *History of Humanities* (University of Chicago Press).

[2] Bod, *New History*, 14–20.

[3] Ibid., 9.

[4] Robert Ferguson, "The Judicial Opinion as Literary Genre," *Yale Journal of Law and the Humanities* 2 (1990): 201–220.

5 Ayelet Ben-Yishai, *Common Precedents: The Presentness of the Past in Victorian Law and Fiction* (Oxford: Oxford University Press, 2013); Natalie Zemon-Davis, *Fiction in the Archives: Pardon Tales and Their Tellers in Sixteenth-Century France* (Stanford, CA: Stanford University Press, 1987).

6 There are, of course, exceptions, including important works like *Law Books in Action: Essays on the Anglo-American Legal Treatise*, ed. Angela Fernandez and Markus Dubber (Oxford: Oxford University Press, 2012).

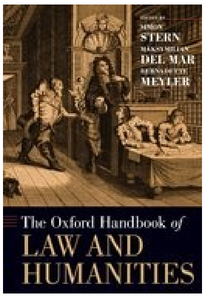
7 Barton Beebe, "*Bleistein*: The Problem of Aesthetic Progress and the Making of American Copyright Law," *Columbia Law Review* 117 (2017): 319–398.

8 Annelise Riles, *Financial Citizenship: Experts, Publics, and the Politics of Central Banking* (Ithaca, NY: Cornell University Press, 2018).

9 For work on the post-critical turn, see Rita Felski, *The Limits of Critique* (Chicago: University of Chicago Press, 2015); Elizabeth S. Anker and Rita Felski, *Critique and Post-Critique* (Durham, NC: Duke University Press, 2017).

10 Judith Butler, *Excitable Speech: A Politics of the Performative* (London: Routledge, 1997).

11 See, e.g., Reinhart Koselleck, "Sediments of Time" and "History, Law, and Justice," in *Sediments of Time: On Possible Histories* (Stanford, CA: Stanford University Press, 2018), 3–9, 117–136; see also Niklas Olsen, *History in the Plural: An Introduction to the Work of Reinhart Koselleck* (Oxford: Berghahn Books, 2012).



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CHAPTER

1 Materialism and Legal Historiography, from Bachelard to Benjamin

Christopher Tomlins

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Abstract

As the linguistic/cultural turn of the last fifty years has begun to ebb, sociolegal and legal-humanist scholarship has seen an accelerating return to materiality. This chapter asks what relationship may be forthcoming between the "new materialisms" and "vibrant matter" of recent years, and the older materialisms—both historical and literary, both Marxist and non-Marxist—that held sway prior to post-structuralism. What impact might such a relationship have on the forms, notably "spatial justice," that materiality is assuming in contemporary legal studies? To attempt answers, the chapter turns to two figures from more than half a century ago: Gaston Bachelard—once famous, now mostly forgotten; and Walter Benjamin—once largely forgotten, now famous. A prolific and much-admired writer between 1930 and 1960, Bachelard pursued two trajectories of inquiry: a dialectical and materialist and historical (but non-Marxist) philosophy of science; and a poetics of the material imagination based on inquiry into the literary reception and representation of the prime elements—earth, water, fire, and air. Between the late 1920s and 1940, meanwhile, Benjamin developed an idiosyncratic but potent form of historical materialism dedicated to "arousing [the world] from its dream of itself." The chapter argues that by mobilizing Bachelard and Benjamin for scholarship at the intersection of law and the humanities, old and new materialisms can be brought into a satisfying conjunction that simultaneously offers a poetics for spatial justice and lays a foundation for a materialist legal historiography for the twenty-first century.

Keywords: Gaston Bachelard, Walter Benjamin, materialism, material imagination, history, law, time, spatial justice

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WHO among us reads Gaston Bachelard? Whether we are historians of law, or humanists in search of law—why read the work of a long-dead philosopher of science?

We should be reading Bachelard because, imperceptibly, the humanities have begun to bend away from the linguistic turn of the past fifty years, from its dictatorship of the indeterminate, and back toward materialism. But this is not the materialism of a century ago. It is a post-structural materialism that rejects Cartesian dualities, renders porous the boundary between human and non-human, and grants all matter its own liveliness.[1] The passive and inert "outside" that awaited transformative mental activity is no more. Things, like people, are protagonists, actants, and participants in the assemblages of activity that produce and reproduce sociality.[2]

p. 4 Bachelard helps us because his encounters with matter personify its hybridity. This is the subject of Section 1.1 of this chapter. In his history and philosophy of science, Bachelard was among the first to grapple with the impact of the late nineteenth and early twentieth century's revolution in physics and mathematics—relativity, quantum mechanics, the uncertainty principle—that overthrew Newton's mechanistic universe.[3] To representations of the historical development of scientific theories and concepts as "smooth and continuous," Bachelard counterposed a non-Cartesian dialectical naturalism that rewrote the history of science as "discontinuous [and] successively ruptured," littered with obstacles overcome in decisive "epistemological breaks."[4] Simultaneously, the "wave and rhythmic characteristics" of matter disclosed by the new subatomic sciences led Bachelard into sustained engagement with the poetics as well as the science of materiality. "If a particle ceased to vibrate, it would cease to be," he writes in *The Dialectic of Duration*. "Our houses are built with an anarchy of vibrations. We walk on an anarchy of vibrations. We sit down on an anarchy of vibrations."[5] Science was a mode of imagination that granted access to this world of vibrating matter, but so was aesthetics. The study of poetic creation revealed "images that stem *directly from matter*." This "material imagination" became, no less than "the scientific mind," Bachelard's preoccupation.[6]

Bachelard's vibrant matter leads us to what should be the first preoccupation of the legal historian—time. This is the subject of Section 1.2. Matter persists because it vibrates at a particular frequency, which means it exists "in and only in a time that vibrates." To the extent legal historians have taken a philosophical interest in time, however, they have gravitated toward an expression of time that does *not* vibrate, time as duration, Henri Bergson's formulation (*durée*) of time "as an experience of ceaseless becoming." But time has more than one aspect. "We must ascribe fundamental duality to time," writes Bachelard, "since the duality inherent in vibration is its operative attribute." Orthogonal to duration was "the instant," time held together only by the rhythms of repetition, its poetics "discontinuous and disruptive," an explosion out of the continuum of historical time.[7]

p. 5 To elevate the instant's temporal ruptures over the purely metaphorical continuities of *durée* leads us further yet, to the second preoccupation of the legal historian—law and justice. How? This is the subject of Section 1.3. Here we encounter Walter Benjamin, whom—these days—no one needs to be persuaded to read. In Section 1.3 he will help us understand the possibilities inherent in the relationship between the material imagination, which is Bachelard's preoccupation, and law and justice, which is ours.

Constantin Fasolt has demonstrated the impossibility of writing the history of law without writing the history of justice. The categories cannot be separated. "Law and justice are thoroughly intertwined." This is not to argue that law and justice are the same, or that one can be derived from the other. Law and justice "differ as deeply from each other as having rules differs from following rules, meaning from understanding, and thinking from acting. … Law embodies our agreement in definitions of what we ought to do, and justice embodies our agreement in judgments of what that *is*." But law and justice are, in effect, codependent. "[W]ithout justice we cannot make the law stick to reality. There would be nothing for law to say. And without law, justice would be random. That is, there would be no justice at all."[8]

Against the tendency of historicist critique to treat invocations of justice as ahistorical moves beyond history to timelessness, Fasolt establishes that law and justice "consist of agreements in judgments and definitions of what is right and wrong that are specific to specific communities of human beings at specific times and places.”[9] That is, law and justice intertwine in *instants* that are specifiable. This aligns us with theories of the materialization of law in space, and the consequent spatialization of justice in time. Their subject is “the struggle of various bodies—human, natural, non-organic, technological—to occupy a certain space at a certain time,” a struggle that creates the ruptures, “cracks of the continuum,” or in other words *instants*, in which the dissimulating “lawscapes” upon which struggles occur are rendered materially visible, and justice becomes momentarily conceivable as the renegotiation of position.[10]

p. 6 The lawscape returns us to the ubiquity of vibration, for lawscaping is an activity at once material and temporal, “an act of repetition of the here/now and the way the past passes through it, that aims at capturing the future. This is the function of the law, which … stabilises societal expectations over time.” But as one would expect of a temporality of instants, lawscaping “is full of internal splits, ruptures, events of distancing, pausing, revolting.”[11] Such immanent vibration offers chance but not direction. Materialism is not a philosophy of transcendence but one that seeks reality. But reality is shapeless, at least in a Cartesian sense.[12] Our job is not simply to find it, but also to fashion it. To this task, both old and new materialisms can contribute. That is the subject of Section 1.4.

1.1 The New Scientific Spirit

In the thirty-five years between completing his doctorate in 1927 and his death in 1962, Gaston Bachelard wrote twenty-four books. At first he attended primarily to science as an activity. After his appointment to the inaugural chair in history and philosophy of the sciences at the Sorbonne in 1940 he turned more to poetics. But throughout he was engaged by aesthetics no less than science.[13] And throughout the material imagination was uppermost. Bachelard took the non-Cartesian position that “we are not outside of the material world we know, but a natural part of it.”[14]

Bachelard’s most accessible statement of the meaning of material imagination in contemporary scientific investigation can be found in *The New Scientific Spirit* (1934). Bachelard took the position that “objectivity was located in the *activity* of science rather than in objects themselves.”[15] An immediate “reality” was no more than the provisional beginning for scientific activity, whose task was not to test its conformity with given a priori categories but to construct statements about reality through experimentation designed to realize the rational, the supreme statement of which was to be found in the totality and internal coherence
p. 7 of mathematics. Hence Bachelard’s “dialectical ↳ naturalism”—the movement from mathematics to experiment and back, “mathematics projecting a structure of entities to be looked for, experiment exhibiting these entities as found through phenomeno-technology.”[16]

From the material character of scientific investigation, *The New Scientific Spirit* moved to the character of the material world newly produced by Einstein’s non-Newtonian physics, the epitome of Bachelard’s theory of science’s radical discontinuity. One encounters the wholesale fragmentation of space, matter, and time. “[M]atter … to the naïve observer, seems localized, compact, and confined within a definite volume.” But matter is “a source and transformer of energy.” Reconceived as energy, matter occupies a “middle ground between the potential and the actual, between space and time … *becoming* as much as it is *being*.” Matter, says Roch Smith, “is not consistent and inert; rather it is based on the rhythmical time of frequencies. … Vibrating frequencies are at the core of existence so that time in its most fundamental aspect is not uniform continuity but vibration. ‘Matter exists in a vibrated time and only in a vibrated time’.… [C]ontinuity is a metaphor.”[17]

In 1938, Bachelard published *The Psychoanalysis of Fire*, the first of what would become a series of books on the material elements “undertaken to show the fundamental influence on the life of the mind of certain meditations aroused by objects.” The book proposed a “psychoanalysis of objective knowledge” that would detect “how unconscious values affect the very basis of empirical and scientific knowledge.” Science treated the material world as inert, ignoring "the fascination *exerted by the object*." Imagination—"autochthonous, autogenous … the true source of psychic production"—undid induction.[18] Studies of water, air, and earth followed.[19] They are marked by three pronounced tendencies. The first is relaxation of any purposeful attempt at psychoanalysis in favor of a technique of inquiry that Bachelard called "dynamic oneirism" or "reverie," the goal of which is to locate the material imagination through identification of the primordial archetypes that precede the mind's perceptions of reality and answer "imagination's all-consuming *desire* to go deep into matter."[20] The second is the association of reverie with a deliberately naïve realism in discerning the literary images from which archetypal image complexes—the poetics of matter—might be constructed.[21] p. 8 ↳ The third is the ever-presence of dynamic reverberation between matter and the material imagination in the image itself. "An image has a double reality: a psychological reality and a physical reality. It is through the image that the one who imagines and the thing imagined are most closely united."[22] The rhythms of matter register in the images of poetics. As Joanne Stroud puts it, "an active image *vibrates*." In Bachelard's words, "all images emerge somewhere on a continuum. … They exist dialectically, balancing the seductions of the external universe against the certitudes of the inner self."[23] In Einstein's science matter occupied a middle ground between the potential and the actual, between space and time; so it did in the poetics of the material imagination.

1.2 A Matter of Time

Some years before his turn from the material imagination's scientific to its aesthetic expression, Bachelard had offered a substantial hint of what was to come in *Intuition of the Instant* (1932) and *The Dialectic of Duration* (1936).[24] Inspired by his friend Gaston Roupnel,[25] both books engaged critically with Henri Bergson's philosophy of time from a post-Newtonian perspective. Contradicting Bergson's emphasis on duration (*durée*), Roupnel had proposed, said Bachelard, that "[t]ime has but one reality, the reality of the instant." The proposition was supported, decisively, by relativity theory—"Einstein's critique of objective duration"—which rendered the lapse of time relative to the method of its measurement while maintaining "*the well-specified instant … as an absolute*." Bachelard described the instant as a convergence point for consciousness as well as being—a "fusion of spatial atomism and temporal atomism" in a "space-time-consciousness complex." Not even perception was a function of time. Reduce duration to its smallest fragment, one never encountered simple endurance and homogenous time. "[I]t was alive! No matter how small the fragment we considered, a microscopic examination sufficed to reveal a multiplicity of events teeming within it."[26]

But if "it is the present instant that bears the full weight of temporality," if "[t]he past is as empty as the future" and the future "as dead as the past," how do human beings "build in time as we build in space"? How, without duration, imagine a past (memory) and a future (anticipation)? Bachelard's answer was—habit. Habit was the association of origination with repetition. It was "the will to *begin* to *repeat* oneself." Rhythmic repetition p. 9 ↳ granted being *resonance*.[27] Continuity was a discontinuous form reconstituting itself. Bachelard refined the argument in *The Dialectic of Duration*. Duration was metaphor, not reality. The mental time of the instant was always orthogonal to duration's representation of lived time as horizontal continuity. Real time was an oscillation.

It is remarkable that time is historians' stock-in-trade, yet rarely the object of their curiosity.[28] "Too often," Renisa Mawani has observed, time "is assumed rather than problematized, conceived as a natural backdrop." Inspired by the work of Kunal Parker and Elizabeth Grosz, Mawani has written eloquently of the multiple temporalities of law: of the common law's immemoriality, its eternal presence, its claim to continuity, its admission only of insensible change; of the "coarse and resistant encounters between an unfolding and overarching [legal] *telos* and the multiple and unforeseeable temporalities of specific subjects, objects, and events that continually exceed and escape legal order and arrangement"; of Western law's chronologizing of the world, its "imposition of a single, Western, secular, and overarching time."[29] Parker himself structures his *Legal Thought Before Modernism* around Anglo-American law's serial self-representations, as custom, as consent, as spirit, as life; each a distinct temporality, each an evasion of historicist fetters.[30] Reinhardt Koselleck, too, writes of *mitteleuropäisch* law's distinctive temporality—different from political, or for that matter social or economic, rhythms.

For Koselleck, law thematizes structures rather than events, expressed in the language of *durée*. Unlike narrative texts, legal source texts claim their validity from repeated application. "Narrative texts or documents refer to singular processes to which they testify. Texts that constitute laws … interrupt the preceding chain of events in order to install a new kind of duration."[31] But what makes interruption (caesura, rupture, *coupage*, cut) anything other than an *event*? What makes repetition a signifier of *durée* rather than habit, or frequency?[32]

p. 10

> Bergson takes eventful time at the very level of the consciousness of events, and gradually obliterates those events, or the consciousness of events, until he reaches what he believes to be event-free time—namely, the consciousness of pure duration. By contrast, the only way we ourselves can feel time is by multiplying conscious instants. … Consciousness of time is always, for us, an awareness of the utilization of *instants*.[33]

"Event" lends itself to "time's primordial element"—the orthogonal instant.[34] This is why *durée* can never be more than a metaphor. If there are "different velocities of change in political, social, economic, linguistic, and legal history," if "the history of law proceeds more slowly and has a different speed of transformation than the sequence of events that is characteristic at least of political history,"[35] these are subjective choices in how to perceive instants and their repetition, however unconscious the choice may be. They are the relativities of material imagination.[36]

1.3 "We Cannot Draw Closed the Net in Which We Stand"

Walter Benjamin's gnomic observation on nets, says Samuel Weber, speaks to his interest in earthly no less than cosmological phenomena—the "knots and nodes, links and interstices that make up 'the net in which we stand.' "[37] To stand in a net is not merely to exist in a context or, necessarily, to be enmeshed by that context. It is to stand, unsteadily, in that which materially supports, constricts, destabilizes, and simultaneously stretches one's capacities for thought and action; in that which one has made oneself—or at least assisted in the making—and on which one is reliant, to which one is vulnerable, over which one cannot gain any real control; and which is also, in the sense of air held together by string, difficult to detect, imperceptible, evanescent. The image is at once profoundly spatial, dynamic, and unstable. In all these characteristics, it is also profoundly legal.[38]

p. 11 Benjamin's net appears in a text fragment, "Capitalism as Religion," written in 1921, unpublished during his lifetime. The fragment addresses capitalism as a cult of guilt, permanent and all-pervasive, its objective "endurance right to the end."[39] In the *Selected Works* the fragment is immediately preceded by another, "The Meaning of Time in the Moral Universe," also written in 1921.[40] Here we encounter law explicitly, as "the tendency to retribution," or in other words as a clear complement to a cult of endless guilt, but also a world apart (sharply set off) from the moral universe of the fragment's title. "Retribution is fundamentally indifferent to the passage of time, since it remains in force for centuries without dilution." Retribution even imposes, in a profoundly heathen way, on the Last Judgment, which it takes to be "the date when all postponements are ended and all retribution is allowed free rein." But in the moral universe forgiveness battles retribution, with time its ally. "For time" in the moral universe "is not the lonely calm of fear but the tempestuous storm of forgiveness which precedes the onrush of the Last Judgment."

The duality of Benjamin’s times counterposes the orthogonal instant of justice—the storm of forgiveness—to law’s *durée*, the lonely net in which profane humanity stands, unfulfilled, “and paws the ground in place.”[41] Constantin Fasolt tells us these times are in fact entwined; for “without justice we cannot make the law stick to reality.” Entwined, each lends the other its unique temporality, and thus creates a chance for history where otherwise there could be none. It is true that, as estranged isolates—interminable law on the one hand, vertiginous justice on the other—their separation resonates with the here of our contemporary now. But for Fasolt that only makes their entanglement more important. His reason is to defend. “Law and justice may lose their normal meaning when times change.” In such times an account of their entanglement “helps to protect their meaning from vanishing completely.”[42]

An extended, distinct, but thoroughly resonant account—of law, of justice, of their relations and temporalities, and also of their materiality, their *spatiality*—comes from Andreas Philippopoulos-Mihalopoulos. Here too we find “we cannot draw closed the net in which we stand,” or in Philippopoulos-Mihalopoulos’s words “there is no outside.”[43] But, like Benjamin, Philippopoulos-Mihalopoulos holds out p. 12 some hope that ↳ “[l]ater ... this will be seen through.”[44] What will be seen through in his case is what he calls the *atmosphere*, “the comfort offered by supposedly free choices, power structures, or even by fate ... an enclosure of desire” that brims with illusions, a dissimulation that can be seen through only by withdrawal from its deep embrace.[45] Withdrawal renders visible the *lawscape*, the ordering of space by implicit or explicit injunctions that makes bodies—“human, nonhuman, technological, natural, immaterial, material, elemental, systemic”—move in pre-specified ways.[46] Law (*lawscape*) is “an embodied process of orchestrating space.”[47] Justice is therefore *spatial justice*, “the emergence of a negotiation” among bodies or assemblages desirous of occupying “the same space at the same time,” that, through the ruptures created in the act of withdrawal, creates an occasion for adjustment. “Spatial justice ... is not a prescribed avenue but merely the possible reorientation of the lawscape according to the bodies that have withdrawn.”[48]

The lawscape necessarily has a temporality. “Only one body can occupy a specific space at a specific time.” Its time “is one of constantly renegotiated now.” But this is a dual time, for the lawscape is a continuum. “Each lawscap*ing* is an event, a change in the in/visibility between space and law. ... But since the lawscape is both a fractal and a continuum, at any point there are two temporalities: that of the specific lawscape and that of the lawscape as continuum.” We can imagine these temporalities as distinct—the horizontal *durée* of the continuum, the orthogonal instant of the rupture that opens the lawscape to lawscap*ing* and thus to the emergent possibility of spatial justice—or as the instant in two manifestations—the one sole and discontinuous (event), the other reconstituting itself, repeating itself, prolonging itself, the continuum an assemblage of instants (habit). In either case, time is of central importance to *Spatial Justice*. It is precisely extension in time and space, repetition “in a frenetic closure of self-perpetuation,” that enables *lawscape* to transfigure itself, become *atmosphere*.[49] It is also the discontinuous time of the instant that signifies rupture, that returns the materiality of the lawscape to visibility.

The atmosphere, the net, are both material images of the world. They appear to possess different valences. Philippopoulos-Mihalopoulos imagines the possibility of withdrawal “in order to reorient the inside in a way that bodies can fit in better with each other.” Benjamin’s remorseless text, in contrast, seems to offer no resolution to the ever-intensifying agony of despair that the cult of capitalism produces. Werner Hamacher has argued that in the completeness of the despair it creates, in the completeness of its destruction of all existence, the cult annihilates itself. The orthogonal instant of justice finally overwhelms p. 13 capitalism’s *durée* of despair. “It comes about not as reform ↳ or reformation, but as the true revolution eliminating at every moment the traces of [capitalism’s] guilt-system.”[50] Samuel Weber offers a less cathartic, less hopeful interpretation. As all-pervasive cult, capitalism replaces the pre-Reformation phenomenological and theological world with a new mode of knowledge, knowledge of *die Bilanz* (the bottom line), that is, knowledge only of itself. It seizes upon a specific material practice—commerce’s mode of calculus—and renders it utterly ubiquitous. “Each bottom line ends one balance sheet and begins another. The process is in principle infinite and yet immanent.”[51]

Yet Weber is unwilling to leave us entirely entangled in the *durée* of despair. “This will be seen through.” Seeing-through became Benjamin’s mission in *Passagenwerk* (*The Arcades Project*), yielding in a riot of material images an outcome not unlike that for which *Spatial Justice* agitates—the visibilization of “the hidden framework [*die Armature*] that allows things to be seen, displayed, exhibited, desired, purchased, and consumed—but which itself remains generally unnoticed,” affording “a medium through which an alternative to the cult of capitalism becomes thinkable.”[52] Weber describes this medium as “a notion of space that is quite different from the traditional concept of extension … not just space as abstract extension but a very distinctive form of ‘stretching’ related to situated bodies.” Visibilizing the net, the framework, the atmosphere, renders the space it delimits liable to alteration, its “layout” (*Lage*) and that which is “laid-out” (*Die Gelegenen*) appearing in “the unstable dynamics of an ongoing relation: the lay of the land.”[53]

The living remain in the net—there is no outside.[54] But the work of *Passagenwerk* alerts one not just to standing but instead to going on—to finding opportunities in the net to tie different knots, knots of solidarity, events that will stretch the net.

1.4 “Wait Doggy, I Haven’t Paid Yet”

We do not begin with the real, we receive it. The atmosphere, the armature, the lawscape, the net: they project our realities for us. But they are not givens, they are the material imagination at work and so they are also vulnerable to its muse. “Science invents its own objects, it constructs its own world, subject only to eventual confirmation of its p. 14 ↳ constructs by experimentation.”[55] But experiments need not confirm; they can also deny. Experiments are events, moments of uncertainty, epistemological breaks, ontological instants. They can rupture received understandings, and so expose them.

In her 2010 essay on “Elusive Material,” Rey Chow argues that the “signature intervention” of new materialism in its relation to the old materialism of Marxism is its “transformation of the classic Marxist opposition between ‘head’ and ‘hand’ (or superstructure and base, or thoughts and actions) into what may be called the determinacy of the signifier,”[56] a “paradigm shift from the (time-honored and still prevalent) conflation of materialism with economism,” in which materialism’s agency is that of “preexisting concrete ground,” or in other words “economic base,” to “a revamped materialism” that positions the human subject not as consciousness determined by social being, but rather as always incomplete effect of “chain[s] of signification.”[57] As illustration, Chow draws to our attention a striking allegory employed by the German Marxist Alfred Sohn-Rethel in his analysis of exchange. “Take your dog with you to the butcher and watch how much he understands of the goings on when you purchase your meat. It is a great deal and even includes a keen sense of property which will make him snap at a stranger’s hand daring to come near the meat his master has obtained. … But when you have to tell him ‘Wait, doggy, I haven’t paid yet!’ his understanding is at an end.”[58] Sohn-Rethel’s story, says Chow, signifies the extent to which consciousness is abstracted from social being. Human beings “participate in … exchange spontaneously and unconsciously, without knowing or thinking much about it.”[59]

Suppose we treat Sohn-Rethel’s story not as an allegory but as an experiment that tests, and ruptures, a received reality. His dog’s failure to understand the routines of monetized exchange is an ontological instant. By paying attention to a dog’s incomprehension, the *durée* of exchange is ruptured.[60] It is a moment of *awakening*. “The reform of consciousness consists entirely in making the world aware of its own consciousness, in arousing it from its dream of itself.”[61]

Sohn-Rethel's point is that exchange is a social interaction "not related to our natural or physical being, but comprehensible only in our interrelations as human beings," hence inaccessible to a dog living exclusively in a world of natural realities. Unlike dogs, human beings live in two spatio-temporal complexes, "side by p. 15 side." But these two ↳ complexes are "mutually exclusive and of sharply contrasting description." They comprise the material world of use, and the purely social, entirely abstract world of exchange. Sohn-Rethel understands the world of use "as the entire sphere of man's inter-exchange with nature" in which "time and space are inseparably linked with the events of nature and the material activities of man." In contrast, exchange "empties time and space of their material [and natural] contents and gives them contents of purely human significance connected with the social status of people and things." Exchange renders time and space homogeneous and continuous. "The exchange abstraction excludes everything that makes up history, human and even natural history. The entire empirical reality of facts, events and description by which one moment and locality of time and space is distinguishable from another is wiped out. Time and space assume thereby that character of absolute historical timelessness and universality which must mark the exchange abstraction as a whole and each of its features."[62]

Chow's claim of classic Marxism's conflation of materialism with economic base notwithstanding, Marx himself, as is well known, begins *Capital* not with base but superstructure, not with mode of production but with exchange—the "accumulation of commodities."[63] Commodities "come into the world in the shape of use-values, articles, or goods. … This is their plain, homely, bodily form." As such, they are easily understood, not at all mysterious: "To discover the various uses of things is the work of history." But in fact commodities are "very queer things," a character originating not in their utility but in the "commodity form"—the attribution of exchangeability that renders commensurate in quantities of value all the different sorts of human labor expended on different products. And exchange requires something else in addition, a homologous legal form that places each commodity's guardian in relation to the other as persons who will "not appropriate the commodity of the other … except by means of an act done by mutual consent."[64]

Here, then, we pass from one space-time-consciousness complex to another, from the world of use, in which "time and space are inseparably linked with the events of nature and the material activities of man," in which "to discover the various uses of things is the work of history," to the world of exchange, in which time and space assume the character "of absolute historical timelessness and universality." In the world of use, matter and history are both lively: things are "assemblage[s] of many properties." In the world of exchange, the liveliness of matter and of history—"the entire empirical reality of facts, events and description by which one moment and locality of time and space is distinguishable from another"—is wiped out by abstraction, "the constant repetition of exchange" which "makes it a normal social act."[65] As Sohn-p. 16 Rethel puts it, "Wherever ↳ commodity exchange takes place, it does so in effective 'abstraction' from use. *This is an abstraction not in mind, but in fact.*"[66]

For Marx, it is true, human history is a succession of modes of production—ancient, feudal, and bourgeois—in which materialism's agency appears economistic. In each, the social relations of production are characterized by an antagonism that arises from the material conditions of existence experienced by individual human beings. But Marx's materialism is not *philosophically* economistic. After all, Marx calls this succession of modes of production the *prehistory* of human society. For, he says, the bourgeois mode of production is the last to be characterized by antagonism. "The productive forces developing within bourgeois society create … the material conditions for a solution." The flowering of those forces, the breach of their fetters, heralds the beginning of true human history—the history of authentic human self-realization, of self-discovery as a species-being.[67]

1.5 Conclusion: “The Space of Someone Waking Up”

To escape from “exchange” into “use” is to escape from inertia into liveliness, and from unfulfilled to fulfilled time. Benjamin called this “find[ing] the constellation of awakening” and it was central to his conception of historical materialism.[68] “Awakening” meant not the sober intellection of convention, purposeful and discriminating, but involuntary awareness, sudden and unbidden, an instant of material imagination—a smell, a touch, a taste, a sight.[69] Benjamin called it “actualization,” which was his way of describing how p. 17 ↳ Marcel Proust tried to free himself from the reflective intellection of purposeful remembering and lay himself open to the stir to the mind of involuntary recollection.[70]

Under reflective intellection’s relentless submersive assault on cognition we surrender involuntary recollection to the realm of dream and fantasy, so easily discarded—“forgotten”—in the light of day. Reflective intellection is the soma of our atmosphere. It induces us to forget. To it Benjamin opposed what comes to us when caught unawares, at the margin of consciousness—at the edges, on the fringe, out of the corner of one’s eye, in the “trash” of life. This was not to rename dream as reality, to prefer the unconscious to consciousness, but rather to hold on to what was known at moments of awakening, before it was swamped by the endless requirements of day. “Thus, in Proust, the importance of staking an entire life on life’s supremely dialectical point of rupture: awakening. Proust begins with the evocation of the space of someone waking up.”[71]

Awakening was escape from the *durée* of bourgeois exchange and progress into an instant of recognition, of actuality.[72] It was integral to Benjamin’s materialist philosophy of history and of temporality, in which history is not the product of conscious reflection but of constellation, recognition of a phenomenon that “flashes up” without warning, an image or a memory that presents itself at a precise conjuncture—“the moment of its recognizability”—to be seized at that instant, and by that instant, or lost.[73] It was to understand time not as historicism’s endless sequence of things in place, nor as an irredeemable eternal present, but as a “fold” which, by conjoining past and now, would “blast open the continuum of history,” producing “the birth of authentic historical time, the time of truth.”[74]

Like Walter Benjamin, Gaston Bachelard thought a great deal about images.[75] Like Benjamin, he thought the image the means to encounter, read, and know the material p. 18 ↳ (spatio-temporal) world. Like Benjamin, he worked out a method to plumb the image, in his case *reverie*, that removed its observer from the *durée* of reflective intellection to the instant of *awakening*.[76]

Bachelard was hardly a stranger to dialectics, but he was no Marxist, and beyond his theory of epistemological ruptures in the history of science he had no developed philosophy of history as such; to him dialectics was a form of rhythmanalysis. Together, nonetheless, Gaston Bachelard and Walter Benjamin allow us a productively coupled point of entry on the current epoch’s “new materialism,” formulated at a time (1920–1960) when new materialism supposedly did not exist. We can conclude that “new” materialism is not so new. Nor (as I have tried to show in Section 1.4) is “old” materialism something summarily to discard. We should rejoice. Such discoveries encourage the negotiation of a materialism for the twenty-first century among friends, without the dreary sectarian specter of defensive bloodletting.[77]

Walter Benjamin’s description of “the moment of awakening” in terms of a dialectics of consciousness, as “identical with the ‘now of recognizability,’ in which things put on their true—surrealist—face,”[78] could as easily be attributed to Gaston Bachelard. A century before both of them, Marx had identified “arousing [the world] from its dream of itself” as the fundamental objective for the reform of consciousness.[79] The world continues to dream, but the material turn in legal studies has afforded us the opportunity to recognize “the space of someone waking up” as the emergent possibility of (spatial) justice. Between them, Bachelard and Benjamin have given us a materialist poetics for that spatial-temporal-consciousness complex, for that moment of possibility.

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Notes

1 See, for example, Jane Bennett, *Vibrant Matter: A Political Ecology of Things* (Durham, NC: Duke University Press, 2010); Tony Bennett and Patrick Joyce ed., *Material Powers: Cultural Studies, History, and the Material Turn* (Abingdon, U.K.: Routledge, 2010); Irus Braverman ed., *Animals, Biopolitics, Law: Lively Legalities* (Abingdon, U.K.: Routledge, 2016); Diana Coole and Samantha Frost eds., *New Materialisms: Ontology, Agency, and Politics* (Durham, NC: Duke University Press, 2010); Amiria Henare, Martin Holbraad, and Sari Wastell eds., *Thinking Through Things: Theorising Artefacts Ethnographically* (Abingdon, U.K.: Routledge, 2007); Daniel Miller ed., *Materiality* (Durham, NC: Duke University Press, 2005); but cf. Terry Eagleton, *Materialism* (New Haven, CT: Yale University Press, 2016).

2 See Bruno Latour and Steve Woolgar, *Laboratory Life: The Construction of Scientific Facts* (Princeton, NJ: Princeton University Press, 1986); Bruno Latour, *We Have Never Been Modern* (Cambridge, MA: Harvard University Press, 1993); Bruno Latour, *Reassembling the Social: An Introduction to Actor-Network Theory* (Oxford: Oxford University Press, 2007); Bruno Latour, *On the Modern Cult of the Factish Gods* (Durham, NC: Duke University Press, 2010).

3 Roch C. Smith, *Gaston Bachelard: Philosopher of Science and Imagination* (Albany: State University of New York Press, 2016), 1–21. Eagleton reminds us that Newton thought matter "stupid" (i.e., inert). *Materialism*, 3.

4 Pierre Duhem, *The Aim and Structure of Physical Theory* (1906) (New York: Athenaeum, 1962), 3; Mary Tiles, *Bachelard: Science and Objectivity* (Cambridge: Cambridge University Press, 1984), 2, 12, 57. Here as elsewhere in Bachelard's history

and philosophy of science, one can see his pronounced influence on (among others) Louis Althusser, Michel Foucault, and Bruno Latour.

5 Gaston Bachelard, *The Dialectic of Duration* (1936) (London: Rowman & Littlefield, 2016), 124, 125. Smith, *Gaston Bachelard*, 62. (Note that Bachelard uses the word "rhythm" and its derivatives as a synonym for frequency.)

6 Gaston Bachelard, *Water and Dreams: An Essay on the Imagination of Matter* (1942) (Dallas, TX: Dallas Institute of Humanities and Culture, 1983), 1 (emphasis in the original); Gaston Bachelard, *Air and Dreams: An Essay on the Imagination of Movement* (1943) (Dallas, TX: Dallas Institute of Humanities and Culture, 1988), 7.

7 Bachelard, *Dialectic of Duration*, 29, 33–34, 125; Gaston Bachelard, *Intuition of the Instant* (1932) (Evanston, IL: Northwestern University Press, 2013), 27; Renisa Mawani, "The Times of Law," *Law & Social Inquiry* 40, no. 1 (2015): 253–263, 255; Richard Kearney, "Bachelard and the Epiphanic Instant," *Philosophy Today* 52, Suppl. (2008): 38–45.

8 Constantin Fasolt, "History, Law, and Justice: Empirical Method and Conceptual Confusion in the History of Law," *UC Irvine Law Review* 5, no. 2 (2015): 413–462, 417, 443.

9 Ibid., 449; Christopher Tomlins, "Foreword: 'Law As …' III—Glossolalia: Toward a Minor (Historical) Jurisprudence," *UC Irvine Law Review* 5, no. 2 (2015): 239–261, 256.

10 Andreas Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Lawscape, Atmosphere* (Abingdon, U.K.: Routledge, 2015). For recent work at the theoretical intersection of materialism and law/legal history, see, for example, Margaret Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Abingdon, U.K.: Routledge, 2017); David Delaney, *The Spatial, the Legal, and the Pragmatics of World-Making: Nomospheric Investigations* (Abingdon, U.K.: Routledge, 2010); Tom Johnson, "Medieval Law and Materiality: Shipwrecks, Finders, and Property on the Suffolk Coast, ca. 1380–1410," *American Historical Review*, 120 (2015): 407–432, and "Legal History and the Material Turn," in *The Oxford Handbook of Legal History*, ed. Markus Dubber and Christopher Tomlins (Oxford: Oxford University Press, 2018): 497–513; Bruno Latour, *The Making of Law: An Ethnography of the Conseil d'État* (Cambridge: Polity Press, 2010); Genevieve Renard Painter, "When Is a Haida Sphinx: Thinking About the Law with Things," *Northern Ireland Legal Quarterly* 68 (2017): 391–402; Alain Pottage, "The Materiality of What?" *Journal of Law and Society*, 39 (2012): 167–183; Christopher Tomlins, "Toward a Materialist Jurisprudence," in *Transformations in American Legal History: Law, Ideology, and Methods—Essays in Honor of Morton J. Horwitz, Volume II*, ed. Alfred Brophy and Daniel Hamilton (Cambridge, MA: Harvard University Press, 2010), 196–217, and "Historicism and Materiality in Legal Theory," in *Law in Theory and History: New Essays on a Neglected Dialogue*, ed. Maksymilian Del Mar and Michael Lobban (Oxford: Hart, 2016), 57–83; Cornelia Vismann, *Files: Law and Media Technology* (Stanford, CA: Stanford University Press, 2008). See also the essays in *Law Text Culture* 21 (2017), issue entitled *"Law As … IV": Minor Jurisprudence in Historical Key*.

11 Philippopoulos-Mihalopoulos, *Spatial Justice*, 89, 93.

12 Descartes defined matter as that which has spatial extension.

13 Smith, *Gaston Bachelard*, 28.

14 Patrick A. Heelan, "Foreword," to Gaston Bachelard, *The New Scientific Spirit* (1934) (Boston: Beacon Press, 1984), ix.

15 Smith, *Gaston Bachelard*, xx. Mary Tiles quotes Bachelard: "Tell me how you are sought, I will tell you what you are." Tiles, *Bachelard*, 18.

16 Heelan, "Foreword," x. By "phenomeno-technology" Bachelard means "the experimental praxis … of the scientific community." See also Bachelard, *New Scientific Spirit,* 12–13, and 108 (emphasis in original): "Nature's true order is the order that *we* put into it with the technical means at our disposal." Compare Latour and Woolgar, *Laboratory Life*.

17 Bachelard, *New Scientific Spirit*, 64, 69, 70; Smith, *Bachelard*, 62.

18 Gaston Bachelard, *The Psychoanalysis of Fire* (1938) (Boston: Beacon Press, 1964), 1–2, 5, 10, 102, 110.

19 Bachelard, *Water and Dreams*; Bachelard, *Air and Dreams*; Gaston Bachelard, *Earth and Reveries of Will: An Essay on the Imagination of Matter* (1943) (Dallas, TX: Dallas Institute of Humanities and Culture, 2002); Gaston Bachelard, *Earth and Reveries of Repose: An Essay on Images of Interiority* (1948) (Dallas, TX: Dallas Institute of Humanities and Culture, 2011).

20 Bachelard, *Air and Dreams*, 3, 14; Bachelard, *Earth and Reveries of Will*, 2, 3; Bachelard, *Earth and Reveries of Repose*, 2; Bachelard, *Air and Dreams*, 7; Colette Gaudin, *Gaston Bachelard: On Poetic Imagination and Reverie* (Putnam, CT: Spring, 2014), 36–37.

21 Smith, *Gaston Bachelard*, 83–84. Bachelard describes his reading technique in *Earth and Reveries of Will*, 4.

22 Bachelard, *Earth and Reveries of Will*, 3.

23 Ibid., 7; Joanne H. Stroud, "Translating Bachelard's Material Imagination: An Overview," in Gaston Bachelard, *Earth and Reveries of Repose: An Essay on Images of Interiority* (1948) (Dallas, TX: Dallas Institute of Humanities and Culture, 2011), vii–xiv, x.

24 For the connection made explicitly, see Gaston Bachelard, "Poetic Instant and Metaphysical Instant," in Bachelard, *Intuition of the Instant*, Appx. A, 58–63.

25 Gaston Roupnel, *Siloë* (Paris: Librairie Stock, 1927).

26 Bachelard, *Intuition of the Instant*, 6, 16, 17, 18, 21.

27 Ibid., 28, 31, 39–43.

28 Take, for example, *The History Manifesto* (Cambridge: Cambridge University Press, 2014), in which Jo Guldi and David Armitage's analysis of the appropriate *durée* for history attends to time in a purely aggregative, linear sense—the relative merits of long-term versus short-term periodicity.

29 Mawani, "Times of Law," 253–263; Renisa Mawani, "Law as Temporality: Colonial Politics and Indian Settlers," *UC Irvine Law Review* 4 (2014): 65–95, 72, 75.

30 Kunal M. Parker, *Common Law, History, and Democracy in America, 1790–1900: Legal Thought Before Modernism* (Cambridge: Cambridge University Press, 2011).

31 Reinhart Koselleck, *Sediments of Time: On Possible Histories*, trans. and ed. Sean Franzel and Stefan-Ludwig Hoffmann (Stanford, CA: Stanford University Press, 2018), 129–130.

32 Mawani, "Law as Temporality," 72. Alain Badiou names such a rupture an "evental site," an upsurge in "the intensity of existence," which he defines as "the ontological support of its own appearance. … It makes itself, in the world, the being-there of its own being." An evental site "is an ontological figure of the instant: it appears only to disappear." Nothing in the site's ontology "prescribes its value of existence. An upsurge can be a barely 'perceivable' local appearance. … A disappearance may leave no trace." Alain Badiou, *Logics of Worlds: Being and Event, 2*, trans. Alberto Toscano (London: Bloomsbury Academic, 2013), 363, 369, 371. Oliver Feltham comments, "[T]he *and* of being and event … names the space of the subject, the subject of the work of change, fragment of a truth procedure—the one who unfolds new structures of being and thus *writes the event into being*." Oliver Feltham, "Translator's Preface," in Alain Badiou, *Being and Event* (London: Bloomsbury, 2013), xxxii. On the conjuncture between Kierkegaard's philosophy of "the leap" of faith and Badiou's philosophy of the event, see Armen Avanessian and Sophie Wennerscheid, "Introduction: Kierkegaard's Intervention of the Single Individual as Model for Political Theory and Practice Today?" in *Kierkegaard and Political Theory: Religion, Aesthetics, Politics, and the Intervention of the Single Individual*, ed. Armen Avanessian and Sophie Wennerscheid (Copenhagen: Museum Tusculanum Press, 2014), 10.

33 Bachelard, *Intuition of the Instant*, 50.

34 Ibid., 8.

35 Koselleck, *Sediments of Time*, 136.

36 It is important to note that in its rejection of linearity and periodicity, in its curiosity about singularity, repetition, and persistence, Koselleck's *Sediments of Time* at least proposes a theorization of history that recognizes the necessity to engage with post-Newtonian philosophies of time.

37 Samuel Weber, *Benjamin's –abilities* (Cambridge, MA: Harvard University Press, 2008), 250.

38 See generally Philippopoulos-Mihalopoulos, *Spatial Justice*, 1–37. Benjamin's net suggests Latour's network, which (in the case of law) is "nothing but surface, nothing but filaments, nothing but laces" and simultaneously is possessed of enormous tensile strength. See Latour, *Making of Law*, 266.

39 Walter Benjamin, "Capitalism as Religion," in *Walter Benjamin: Selected Writings Volume One, 1913–1926*, ed. Marcus Bullock and Michael W. Jennings (Cambridge, MA: Harvard University Press, 2004), 289–291. Weber's translation in *Benjamin's –abilities*, at 262, differs: "hold out until the end."

40 Walter Benjamin, "The Meaning of Time in the Moral Universe," in *Walter Benjamin: Selected Writings Volume One, 1913–1926*, ed. Marcus Bullock and Michael W. Jennings (Cambridge, MA: Harvard University Press, 2004), 286–287.

41 Walter Benjamin, "Paris, Capital of the Nineteenth Century" (1939), in Walter Benjamin, *The Arcades Project*, trans. Howard Eiland and Kevin McLaughlin (Cambridge, MA: Harvard University Press, 2002), 14–26, 26 (citing Louis Auguste Blanqui, *L'Éternité par les astres: Hypothèse astronomique* (Paris: Librairie Germer Bailliére, 1872), 76).

42 Fasolt, "History, Law, and Justice," 443.

43 Philippopoulos-Mihalopoulos, *Spatial Justice*, 1.

44 Weber, *Benjamin's –abilities*, 252. (In *Selected Writings Volume One* the translation is "Later on … we shall be able to gain an overview of it.")

45 Philippopoulos-Mihalopoulos, *Spatial Justice*, 2.

46 Ibid., 5, 129; Dylan Trigg, "Atmospheres, Inside and Out," *Environment and Planning D: Society and Space* 34 (2016): 763–773, 767.

47 Luigi Russi, " 'a Legge d' 'o Munno—Three Sketches on Spatial Justice," *Global Jurist* 16 (2016): 1–25, 2.

48 Philippopoulos-Mihalopoulos, *Spatial Justice*, 6.

49 Ibid., 87, 91. "Atmosphere is the lawscape's wet dream" (4).

50 Werner Hamacher, "Guilt History: Benjamin's Fragment 'Capitalism as Religion,' " *Cardozo Law Review* 26 (2005): 887–920, 916.

51 Samuel Weber, *Targets of Opportunity: On the Militarization of Thinking* (New York: Fordham University Press, 2005), 123.

52 Weber, *Benjamin's –abilities*, 270, 277. On Benjamin's very similar concept of "phantasmagoria," see James R. Martel, *Divine Violence: Walter Benjamin and the Eschatology of Sovereignty* (Abingdon, U.K.: Routledge, 2012); *Textual*

Conspiracies: Walter Benjamin, Idolatry, and Political Theory (Ann Arbor: University of Michigan Press, 2013); and *The One and Only Law: Walter Benjamin and the Second Commandment* (Ann Arbor: University of Michigan Press, 2014).

53 Weber, *Benjamin's –abilities*, 277, 278.

54 See Delaney, *Spatial, Legal, and Pragmatics*, 17.

55 Smith, *Bachelard*, 24–25.

56 "[B]roadly understood as language, action, practice, ritual, or gendered orientation and behavior." Rey Chow, "The Elusive Material: What the Dog Doesn't Understand," in *New Materialisms: Ontology, Agency, and Politics*, ed. Diana Coole and Samantha Frost (Durham, NC: Duke University Press, 2010), 221–233, 226.

57 Ibid.

58 Alfred Sohn-Rethel, *Intellectual and Manual Labour: A Critique of Epistemology* (Atlantic Highlands, NJ: Humanities Press, 1978), 45.

59 Chow, "Elusive Material," 222.

60 On the importance of paying attention to dogs, see Colin Dayan, *The Law Is a White Dog: How Legal Rituals Make and Unmake Persons* (Princeton, NJ: Princeton University Press, 2011), 15–17, 209.

61 Karl Marx to Arnold Ruge (September 1843), in *Letters from the Deutsch-Französische Jahrbücher* (Progress Press translation), https://www.marxists.org/archive/marx/works/1843/letters/43_09-alt.htm.

62 Sohn-Rethel, *Intellectual and Manual Labour*, 28, 48–49.

63 Karl Marx, *Capital: A Critique of Political Economy, volume 1* (New York: International Publishers, 1967), 35.

64 Ibid., 35, 47, 71, 83, 84.

65 Ibid., 35, 88; Sohn-Rethel, *Intellectual and Manual Labour*, 48, 49. On abstraction and property, see Brenna Bhandar, "Property, Law, and Race: Modes of Abstraction," *UC Irvine Law Review* 4 (2014): 203–218.

66 Sohn-Rethel, *Intellectual and Manual Labour*, 25 (emphasis added). "When looking at use and exchange as kinds of human practice it becomes plain to see in what manner they exclude each other. Either can take place only while the other does not" (27).

67 Karl Marx, "Preface" to *A Contribution to the Critique of Political Economy* (Moscow: Progress Publishers, 1977), https://www.marxists.org/archive/marx/works/1859/critique-pol-economy/preface.htm.

68 Benjamin, *Arcades Project*, 458. This section is indebted to Christopher Tomlins, "The Strait Gate: The Past, History, and Legal Scholarship," *Law, Culture and the Humanities* 5 (2009): 11–42.

69 By drawing on Reviel Netz, *Barbed Wire: An Ecology of Modernity* (Middletown, CT: Wesleyan University Press, 2004), David Delaney (*Spatial, Legal, and Pragmatics*, 22) offers us an opportunity to enlist pain in the morphology of awakening in a fashion that underlines how recoil *from* awakening instantiates the material conventions of the lawscape. Barbed wire enrolls "[t]he body, the skin, the nerves, and the nervous system … in regimes of spatial prohibition. The body is turned against the experiencing 'self' that would escape or trespass. I suggest that it is useful to think of barbed-wire fences as instances of the materialization of the legal, the incorporation of the 'right to exclude' or confine. They are material artifacts that are enrolled in specific performances of the legal. They constitute particular legal relationships and events; legal cause and effect become neurological events." Repetition teaches convention, and taught convention becomes atmosphere. Still, one cannot assume the awakened body will *always* recoil. (I am grateful to Tom Johnson for this reference.)

70 "[W]hen from a long-distant past nothing subsists, after the people are dead, after the things are broken and scattered, still alone, more fragile, but with more vitality, more unsubstantial, more persistent, more faithful, the smell and taste of things remain poised a long time like souls, ready to remind us, waiting and hoping for their moment, amid the ruins of all the rest; and bear unfaltering in the tiny and almost impalpable drop of their essence, the vast structure of recollection." Marcel Proust, *Remembrance of Things Past, Volume 1: Swann's Way*, trans. C. K. Scott-Moncrieff (New York: Random House, 1934), 57–58.

71 Benjamin, *Arcades Project*, 463–464. As Weber notes, awakening is "distinguished both from consciousness and unconsciousness." Weber, *Benjamin's –abilities*, 168, and see generally 164–175.

72 "The dialectical image is an image that emerges suddenly, in a flash. What has been is to be held fast—as an image flashing up in the now of its recognizability." Benjamin, *Arcades Project*, 473; "The dialectical image is that form of the historical object which satisfies Goethe's requirements for the object of analysis: to exhibit a genuine synthesis. It is the primal phenomenon of history," 474.

73 Walter Benjamin, "On the Concept of History," in *Walter Benjamin: Selected Writings Volume 4, 1938–1940*, ed. Howard Eiland and Michael W. Jennings (Cambridge, MA: Harvard University Press, 2006), 389–400, 390, 391, 397. Benjamin's awareness of the fragility of the moment of conjunction that is "historical knowledge" is overwhelming. "[I]t is an irretrievable image of the past which threatens to disappear in any present that does not recognize itself as intended in that image" (391).

74 Ibid., 396; Benjamin, *Arcades Project*, 463. See Gilles Deleuze, *The Fold: Leibniz and the Baroque* (Minneapolis, University of

Minnesota Press, 1993).

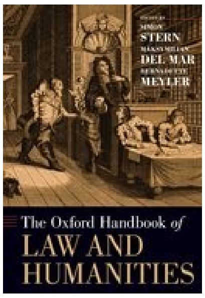
75 Arguably, says Weber, “no writer of critical essays in the twentieth century … made more thought-provoking use of what are commonly called ‘images’ or ‘figures’ … than Walter Benjamin. And no writer reflected more on this use, explicitly and implicitly.” Weber, *Benjamin’s –abilities*, 313. Gaston Bachelard was not a “writer of critical essays” in the sense that Weber invokes here, but as we have seen he too reflected deeply on the use of the image. “Ours is the century of the image,” he writes in *Earth and Reveries of Will*, at 5. “For better or worse, we are subjected more than ever before to the power of imagery.”

76 Bachelard, says Richard Kearney, “made a sustained effort to … focus[ ] on the micro-phenomenon of the poetic image ‘at the moment of its emergence’ in the reader’s waking consciousness.” Richard Kearney, “Introduction,” in Gaston Bachelard, *The Poetics of Space* (New York: Penguin Books, 2014), xxi–xxii. Bachelard’s description of images also showed keen appreciation for their qualities of rupture and convulsion in space and time as *language*. “Certain areas of contemporary literature seem marked by a virtual *explosion of language*. Chemists see an explosion coming when the probability of a reaction’s spread becomes greater than that of its containment. In the brilliance and fire of literary images the consequences of images multiply; *words are no longer simple signifiers*. They no longer merely complete thoughts; *they are the future of imagery*.” Bachelard, *Earth and Reveries of Will*, 5 (emphasis added). See also Constantin Fasolt, “Respect for the Word: What Calvin and Wittgenstein Had against Images,” in *John Calvin: Myth and Reality: Images and Impact of Geneva’s Reformer*, ed. Amy Nelson Burnett (Eugene, OR: Cascade Books, 2011), 165–190.

77 By this measure, Terry Eagleton’s *Materialism*, for all its wit and learning, fails.

78 Benjamin, *Arcades Project*, 463–464.

79 See text at note 61.



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CHAPTER

2 Legal Materiality

Hyo Yoon Kang, Sara Kendall

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Abstract

This chapter presents legal materiality as a distinct approach within law and humanities scholarship. Legal materiality is concerned with the conditions of possibility in and through which law arises, rather than taking law's materiality to be self-evident, as when it is regarded as a form of material culture or when objects are taken as symbols of law. It distinguishes between matters and materials: if matters are problematizations or "matters of concern" to law, materials are the attributes or properties that are enlisted in acts of interpretation. Rather than addressing materials as inert physical elements that are acted upon by law, legal materiality is concerned with how materials *come to matter* by being engaged in the production of legal meaning through interpretive and representational practices. Section 2.2 situates this approach in relation to a broader inheritance of materialism and materiality in the Western tradition. It considers different understandings of "materialism," such as "new materialisms" and historical materialism, that inform but also diverge from legal materiality. Section 2.3 engages with different uses of "materiality" in recent legal scholarship, followed by a detailed discussion of its meaning in two works of legal theory that have sought to articulate a conception of legal materiality. The concluding section discusses the potentials of this approach for law and humanities scholarship to understand how materials are directly implicated in the making of legal difference rather than serving solely as law's objects.

Keywords: materiality, materialism, new materialism, textuality, media studies, Foucault, Latour, Luhmann, Vismann

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2.1 Introduction

LEGAL materiality is an approach to analyzing legality by considering the material manifestations of its formal language and interpretation. It recognizes law as both a hermeneutic and a material phenomenon: as uniquely engaged with issues of interpretation and judgment, yet also mediated by and produced through materials, techniques, and practices. Legal materiality interrogates the contribution of materials and things to the making of legal meaning. It is attuned to the ways in which materials configure "matters of concern" for law: that is, in how law is informed by material conditions and mediated through interpretive and text-based practices.

Legal materiality is concerned with the conditions of possibility in and through which law arises, rather than taking law's materiality to be self-evident, as when it is regarded as a form of material culture or when objects are taken as symbols of law. These conditions of possibility include the built environments—such as courtrooms—where adjudication is performed; the files, paperwork, filing systems, and other forms of media enabling inscription and documentation; and technologies such as transnational surveillance networks and criminal databases used for evidentiary purposes. Legal materiality distinguishes between matters and materials: whereas law's matters are not necessarily physical elements but rather issues or problematizations, materials are the substances, attributes or properties that are enlisted in acts of interpretation. Legal materiality is concerned with how materials *come to matter* to law by being engaged in the production of legal meaning through interpretive and representational practices.

This chapter presents legal materiality as a distinct approach within law and humanities scholarship. Section 2.2 situates this approach in relation to a broader inheritance of materialism and materiality in the Western tradition that is not explicitly related to legal forms. It illustrates how dichotomies between material/immaterial and matter/life developed throughout the Western tradition to inscribe hierarchies of p. 22 value and also considers different understandings of materialisms, such as "new materialisms" and ↳ historical materialism, that inform but also diverge from legal materiality. Section 2.3 engages with different uses of "materiality" in recent legal scholarship, followed by a detailed discussion of its meaning in two works of legal theory that have sought to articulate a conception of legal materiality. The concluding Section 2.4 discusses the potentials of this approach for law and humanities scholarship to understand how materials are directly implicated in the making of legal difference rather than serving solely as "law's objects."

2.2 Materiality's Inheritance

Legal scholarship inherits a long tradition of anthropocentric thinking, where the human appears at the center—if not as the sole inhabitant—of the ontological order. This has not always been the case in the Western philosophical tradition that undergirds much legal theory: classical thought less readily distinguished between materialism and immaterialism. In Aristotle's thinking, for example, the world was a "composite of matter and form: nothing can have form that does not have body."[1] The immaterial or ideal came to prominence through Platonism and Christianity, where the material world and its matters were regarded as less "real" than a metaphysical world beyond, whether the Platonic realm of the forms or the Christian afterlife.[2] This primacy of the immaterial and metaphysical continued through legal theological traditions, as with natural law's connection to divine law, as well as with more humanistic conceptions of *ius gentium* as a law knowable through human reason.[3]

Within legal scholarship and theory, this philosophical inheritance has led to a common dichotomy between the ideational and the material and between the human and the non-human, where law's ontology appears to be associated with the former as a linguistic field that ascribes agency to human subjects. Nietzsche's critique of metaphysics attempted to unsettle this dichotomy, foregrounding the role of the body and the senses as well as the "instincts of life" beyond the human subject.[4] Nietzsche posited "will to power" as a naturalist anti-metaphysical account of being that enables an overcoming of theological residues in Western philosophy, such as the distinctions between subject and object, knower and known, mind and body, and human and animal.[5] He challenged ↳ the anthropocentrism of the intellect, knowledge, and reason: "if we could communicate with the gnat, we would learn that he likewise flies through the air with the same solemnity, that he feels the flying center of the universe within himself."[6] Inspired by Darwin's materialist naturalism, which located humans within nature and disavowed the immateriality of the soul, Nietzsche challenged the disembodiment of the will and posited continuity between the organic and the inorganic world.[7] In this sense his work has been characterized as "materialist" in its rejection of the metaphysical tradition: p. 23

> Nietzsche looks at matter and everywhere sees motion and change, from the simplest chemical reactions and the most basic material forces to the nutritive and reproductive activity of animals and plants and the formative activity of artists and athletes. … Having rejected any transcendent source, Nietzsche comes to hold that the principle of this becoming and struggle must lie in material things themselves, things considered as "dynamic quanta, in a relation of tension to all other dynamic quanta."[8]

Contemporary new materialist theories draw upon Nietzsche's emphasis on the inherent qualities of matters and the decentering of the human, which also influenced Bergson's vitalist conception of life and Deleuze's understanding of embodiment.[9] They oppose the dichotomies between material/immaterial and matter/life that were developed throughout the Cartesian tradition to inscribe hierarchies of values, where the immaterial or "spiritual" order gained prominence much as conceptions of life—and in particular, human life—came to be regarded as superior to inanimate and inhuman matters.[10]

Michel Foucault's efforts to outline an analytic of power have also contributed to a materialist approach, broadly defined, by decentering the human subject as the sole locus of agency. His conception of the *dispositif*, often translated into English as "apparatus" or "assemblage," describes a composition of multiple agentic elements:

> a thoroughly heterogeneous ensemble consisting of discourses, institutions, architectural forms, regulatory decisions, laws, administrative measures, scientific statements, philosophical, moral and philanthropic propositions—in short, the said as much as the unsaid. … The apparatus itself is the system of relations that can be established between these elements. Secondly, what I am trying to identify in this ↳ apparatus is precisely the nature of the connection that can exist between these heterogeneous elements.[11] p. 24

With his conception of the *dispositif*, Foucault presents a set of relations or connections between elements in which power can be concretely located and materialized, distinct from the model of law and sovereignty that juridico-discursive understandings of power draw upon. Techniques of normalization and categorization are performed through practices such as the organization of space, the distribution of bodies, and the development of infrastructures, which are composed of physical matters as well as discursive forms. Foucault's articulation of the *dispositif* brings a concern with logics and discourses together with an interest in the broader ensemble in which law acts and is enacted. As Section 2.3 shows, scholars whose work can be characterized as adopting a legal materialist approach have been informed by Foucault's attention to the material realization of relations between elements of a *dispositif*.

Scholarship that has been referred to under the broad category of "new materialism" draws upon particular strands of physics, biology, philosophy, and the history of science to foreground living matters in an immanent frame, eschewing the metaphysical and ethical tendency to privilege the human over the non-human and the mind over matter. Influential studies in cognitive sciences had argued that the mind is embodied, as well as situated and distributed in its surrounding environment, so that cognition cannot equate to human consciousness.[12] These scientific viewpoints found support in Spinoza's philosophy as an alternative to Cartesianism.[13] Transposing these insights into political and social theory, "new materialist" scholars have sought to correct the tendency to overlook "matter" and to contest idealist assumptions that would posit "immaterial things" such as "language, consciousness, subjectivity, agency, mind soul; also imagination, emotions, values, meanings" as "fundamentally different from matter and valorized as superior to the baser desires of biological material or the inertia of physical stuff."[14]

As a philosophical position, "materiality" here refers to the presumed innate agencies of living organisms or "vital matters" which it seeks to bring into political and social analyses through drawing on diverse p. 25 theories of "emergence."[15] This approach begins ↳ from the premise that "matters" are ubiquitous and agentic, but these attributes are largely overlooked or taken for granted. Feminist new materialists have expressed concerns about the misrecognition of "bodies," in particular through the Cartesian conception of personhood and social agency in law. Here an ethical problem emerges with law and legal forms, which appear as insufficiently attuned to the emergent and innate potentials of material corporeality. Processes of juridification are seen to misrepresent living matters and to deny their full complexity and potential in and by law.

An account of materiality cannot neglect the important role of historical materialism in drawing attention to the relationships between concrete matters and immaterial ideas. Marx understood history as a dialectical relationship between "real" facts, which consist of economic productive forces, and the ideological superstructures which are informed by modes of capitalist production and use. Materialism in this view is empirically verifiable as opposed to abstract:

> The premises from which we begin are not arbitrary ones, not dogmas, but real premises from which abstraction can only be made in the imagination. They are the real individuals, their activity and the material conditions under which they live, both those which they find already existing and those produced by their activity. These premises can thus be verified in a purely empirical way. … What they are, therefore, coincides with their production, both with what they produce and with how they produce. The nature of individuals thus depends on the material conditions determining their production.[16]

Such Marxist historical materialist assumptions of the "real" based on relations of production require unpacking the concrete physical elements in a given production. However, as the material and real are defined through the framework of economics, what counts as material in historical materialism is filtered through the predominantly monocausal lens of economic determinism. A legal materialist approach can complement historical materialism by pointing to the physical and other non-economic elements and properties that inform the ways in which processes of labor, production, and exchange are conditioned and organized, leading to a more detailed account of value formation. For example, the materiality of working wood into furniture is substantially different than assembling steel and various parts for a car. The notion of "material" is particularly difficult to define, however, when it comes to intellectual production, and in financial capitalism, immaterial signs and codes feed into physical machines, rather than the other way around.[17]

"Materiality" might evoke visions of solidity and the "real," yet it is an amorphous and contested concept, and it is often used in conflicting ways within contemporary legal scholarship. As an adjective, "material" denotes an association rather than a fixed relation to a physical object. By contrast, "materialist" refers to a way of understanding causality or a world view. There are considerable diverging premises underlying p. 26 materialism ↳ and materiality. Materialism is often understood as a theoretical claim about "real" and "factual" matters that determine ideologies and superstructures and, by extension, legal phenomena and consciousness. The Marxist strand of historical materialism takes "real" economic processes as causes of "unreal" forms of consciousness, such as law. "New materialism" is less monocausal and determinist, and its proponents argue for a more nuanced understanding of inherent physical agencies as an ethical axiom. The following section presents and discusses the meanings and uses of "materiality" as it has been taken up within legal scholarship.

2.3 Materialist Approaches Within Legal Theory

As a linguistic field, law is connected to modes of claiming and hearing, such as truth claims and demands for (juridical) recognition.[18] It is also concerned with justifications of orders of worth and their regulation.[19] Bruno Latour refers to these as "regimes of enunciation," borrowing Foucault's concept of *énoncé*, contending that "law keeps track of all disengagements, to tirelessly reconnect statements to their enunciators, via the perilous routes of signatures, archives, texts and files."[20] Although Latour's work is often characterized as emphasizing the social agency of non-human artefacts and things, his treatment of legal materiality appears to conceive of it as inherently discursive and textual.

Much work within law and humanities scholarship begins from this discursive and textual approach. For example, James Boyd White's efforts to draw a connection between the role of a cultural object or artefact and its broader context—a mask and the tradition in which it appears—is meant to illustrate the importance of maintaining an attunement to the background in which law acquires meaning.[21] This background is regarded as linguistic, interpretive, and textual, comprised of elements such as litigation strategies, the statutory or constitutional text, legislative debates, and related political discussions. Other work has sought to situate legality in narrative forms, contending that it manifests in everyday narratives of people about "law," which reveal a "legal consciousness" that can be studied through an empirical collection of interviews and scholarly p. 27 ↳ interpretation.[22] But this dominant focus on textual and linguistic dimensions leaves out the effects of non-human entities on language and expression. As Ruth Miller has observed, there are other forms of communication than human language; human law cannot be fully separated from non-human forms of communication because these other forms condition both language and law.[23]

Different understandings of materiality have emerged in contemporary legal theory in an effort to grasp how law manifests beyond textual and linguistic forms. This section briefly considers three of these approaches. First, new materialist concerns have been taken up to account for the complexity and "agencies" of human and non-human matters in legal forms. A second uptake of the term "materiality" in legal scholarship associates law with objects and reads legality into them, though from a less theoretically informed account of law's distinctness. A third legal materialist approach in Anglo-American legal scholarship builds upon the work of legal and media theorist Cornelia Vismann and Bruno Latour's ethnography of the Conseil d'État to consider law's material distinctness.[24] We consider two such texts by Alain Pottage and Christopher Tomlins for their detailed theorizations of legal materiality.

Early critical legal scholarship on law's materiality claimed that there was a tendency in the juridical field to reduce objects to signs, conceiving of material relations only in representational terms.[25] As a corrective, some legal scholarship has adopted concerns from new materialism to consider the social agency of non-human entities. Contemporary feminist engagement with new materialism draws upon insights from particular strands of the natural sciences.[26] It oscillates between a critique of legal naturalization of the sociopolitical and the desire to "reintroduce biological and material agency into feminist analysis."[27] Such ethical concerns can also be found in works on p. 28 ↳ the jurisprudence of non-human agents, such as animals and the environment.[28] The nature of non-living entities such as algorithms has also been explored through philosophical analyses of autonomic computing and human agency.[29] More recent scholarship has examined the legal conceptualization of sounds and their effects in the context of an international criminal tribunal.[30]

A second set of approaches studies law *through* materials by reading law into them. Rather than being concerned with the ethics of representing matters in legal discourse, as with some new materialist approaches, these legal scholars relate law to physical things (such as paintings and sculptures) or intangibles (such as improvisation and atmosphere).[31] This approach produces associations between objects and law rather than establishing a distinction between the legal and the non-legal, and it suggests a material representation of "law as" or the embodiment of "law in" a particular object.[32] Drawing an analogy or a metaphor between a physical object and "the legal" can flatten distinctions between categories, however, producing "dedifferentiation,"[33] without explaining why certain legal concepts exist, what sustains them, and how the attribute of "legal" arises in the first place. As far as law exists *in* society as a distinct and distinguishable field, a legal materialist approach requires accounting for the distinctiveness of law as a category.[34]

A third approach to legal materiality begins from the premise that law is generated in the very moment of attributing legal difference. At the level of legal practice or in "the making of law," law is understood as a process of continual differentiation from its social contexts: as far as it exists, it does so as a difference *to* other forms of discourses. In investigating how such qualifications are made, this body of legal scholarship p. 29 is concerned with the elements that comprise law and their constitutive roles in such a process: forms, ↳ texts, techniques, materials, non-textual media, and bureaucratic arrangements that compose and sustain law as a specific phenomenon and practice.[35] In this view, law is neither a given institution nor a practical enforcement of sovereignty, political power, or jurisdiction, but instead consists of the specific expression and materialization of these ideas in forms that are tangible and intangible, as well as human and non-human. This approach considers how law is produced and stabilized through the concrete choreography and material manifestations of legal matters, such as property, state and territory.

We focus on two texts that theorize legal materiality and its potential contributions to legal ontology and historiography. Alain Pottage's understanding of legal materiality approaches law as a combination of a Foucauldian *dispositif*, a Luhmannian "doubly contingent" process of communication, and a web of Latourian material *agencements*, quasi-agencies, that make and unmake networks of socialities such as laws. Christopher Tomlins's proposition of a Benjaminian approach to the meaning of materiality advances a distinctly temporal dialectical understanding of materiality for legal history. Both pieces build upon the legacy of Cornelia Vismann's historical analysis of law as a concrete and mediated matter. Her monograph *Files* employed Friedrich Kittler's media archaeological approach to cultural studies, which informed her account of how legality and its authority are generated and instituted through documentation and recording media. She focused on files as the authoritative form through which legal difference is expressed and recreated.[36] Pottage and Tomlins also explicitly engage with Latour's notion of legal materiality from *The Making of Law*, an ethnography of the Conseil d'État, and again as part of his more overarching theory of p. 30 sociality as compositional ↳ politics in *An Enquiry into the Modes of Existence*.[37] In *The Making of Law*, Latour applies elements of his actor-network theory of how the "social" is assembled in the legal "regime of enunciation" or as a "mode of existence."

Pottage's "The Materiality of What?" discusses the meaning of a specifically legal materiality that both builds upon and critiques Latour's approach. Latour's ethnographies of scientific practices revealed that scientific facts are not only the intellectual products of scientists who "discover" laws of "nature." Artefacts, non-human actors, and knowledge techniques form part of an emergent actor-network in the making of scientific facticity: laboratory structures, experimental techniques, written records and rhetorical maneuvers shape the production of scientific facts.[38] Pottage agrees with Latour that "materiality" does not connote physical attributes of substances, such as their "mass, density, or spatial definition," but is rather an "agency that is afforded by, elicited from, or ascribed to them."[39] Rather than designating the innate properties of a physical object or matter, materiality instead signifies the moment in which artefacts become “legalized” by acquiring legal meaning and force.[40] Legal materiality is concerned with how things or practices bring to bear such a significance, i.e., *agencement* (quasi-agencies) in Latour’s terminology, and shape the meaning of “law.” Pottage proposes a definition of legal materiality as a heterogeneous Foucauldian *dispositif* composed of discourses (“regulatory decisions, laws, administrative measures, scientific statements, philosophical, moral and philanthropic arguments”) and other human constructions (“institutions, architectural formations”).

Pottage shows how Latour’s emphasis on the linguistic dimensions of law diverges from his account of the agencies of physical things in his materialist analyses of sciences. Latour’s analysis of law relies on the Foucauldian notion of the *énoncé*, enunciation, as the self-observation or the second-order perspective which holds together a specific “legal way of telling truth.”[41] For Latour, the materiality of legal enunciations is qualitative and linguistic rather than physical. Pottage reads Latour’s understanding of law as an isolated and primarily linguistic regime of enunciations disconnected from its material and social environment, with the effect of suggesting that “law is not a material world in the same sense as science or technology.”[42] For Pottage, however, legal enunciations do not exist prior to the ascription of “legal” as a quality, and “the first and most basic technique of law is to decide on the difference between legal and non-p. 31 legal.”[43] The precise ↳ making of legal enunciation should be investigated in material terms by paying greater attention to its physicality and composition, yet Pottage shows how Latour slips back into the formalist understanding of an abstract Law, paradoxically constructing an ahistorical, autonomous, isolated Idea that he sought to dismantle in the context of sciences.[44] Beyond Latour’s analysis, the question is how law also enlists materials, such as humans, non-humans, artefacts, and different modes of communication and techniques of representation, into a specific regime of enunciation. How can the complexity and contingency of law’s distinctness be explained without reference to other constructed socialities, such as “the economic” in Marxist legal theory, “the social” of sociolegal studies, or the “political” of critical legal studies?[45]

Pottage complements Latour’s understanding of law as an autonomous regime of distinct enunciations, or as a Foucauldian *énoncé*, with Luhmann’s conception of law as an emergent body of “doubly contingent” communicative encounters.[46] A matter qualifies as “legal” only by reference to a legal past; at the same time, the need to determine legality, or the attribution of a matter’s legal character, is propelled by its broader social and cultural environment. In this way law is doubly contingent: it is not only bound to its own textual, temporal reading practice as a source of legitimacy but is also conditioned by the concrete claim or problem that it is asked to address and the moment of recognition of this event as “legal.”

In such an internally and externally driven process of differentiation, law can never fully understand the “other”; it can recognize and make sense of other modes of problems and reasonings only within its own terms. The “legal” is therefore continually contingent, as its meaning is never complete or definite. Distinguishing law and “the legal” depends upon the point of observation and on the concrete constellation of materials that are brought to it, and the same legal text will likely be understood and applied differently. Pottage argues that legal materiality as a Foucauldian *dispositif* is better explained by Luhmann’s theory, as it would reintroduce the world into the making of law. It would take into account the simultaneously open p. 32 and closed nature of the making ↳ of legal enunciations. Because this approach decenters both “society” and “law” as radically contingent and evolving knowledge practices, the claim of an abstract, autonomous Law no longer makes sense from such a legal materialist position. Here the event of qualification and ascription of “legality” to social events as legal matters would not exist before distinguishing between the legal and non-legal. In Pottage’s Luhmannian-Latourian interpretation, merely following an object around a network of law cannot grasp the phenomenon of law’s materiality, as the qualification of certain objects as specifically legal materials cannot be presupposed and needs to be explained. Therefore, legal materiality entails the contribution of things in the moment or the event of making a legal difference; that is, in becoming attached to "law."

Building upon Vismann and Latour, Christopher Tomlins's approach to legal materialism shares this attention to the specificity of law as a difference rather than an identity with "society" or context. His work proposes a historical materialist approach based upon Walter Benjamin's conception of history as the present moment or "image" created in a process of recognition of the past from the present viewpoint. Such history derives its relevance and explanatory value neither from past contexts nor external universalist references but purely through the ability of the present observer—in this case, the legal scholar—to recognize the past object or thing in its bearing upon the present. Here the dialectical process is temporal and subjective rather than economic, as with orthodox Marxist framings. Tomlins has suggested a "materialist jurisprudence" in response to an economic determinist explanation of legal history, as well as a "materialist legal history" as a corrective to critical historicist attempts to explain the past through contextual analysis. In his reading, two main problems arise with critical historicism: first, there is the epistemological impossibility that anyone can fully know the past, including past contexts, and relatedly, contextualizations such as "thick descriptions" cannot explain legal meaning. As an alternative, Tomlins proposes Benjamin's simultaneously subjectivist and material mode of historical inquiry into legal meaning that arises "from the image formed by the relationship in the observer's present between the observer and what is observed."[47]

In Tomlins's account, materiality is a historical and dialectical technique of recognition, which elicits previous images by the observer in the now. This Benjaminian approach to materiality in legal history emphasizes the recomposition and making of "legal difference" as a construct of the legal historian. Materials are instruments of present legal scholarly reflexivity. Attending to them is productive because it can reveal the history of fabrication of legal difference in the moment of their recognition: they are not presumed to be "legally material" unless a reflective observer recognizes legal difference in them. As an analogical or metaphorical mode of critique, its analytical potential depends upon the observer's ability to fashion a clear relationship between materials and their legal relevance.

Transposing Benjaminian materiality into legal theory at first seems to provide a richer theoretical grounding for the second strand of materiality described above, which reads law into objects. Tomlins's p. 33 argument for a Benjaminian historical materialist ↳ approach to legal scholarship involves a similar analogical move of thinking about law *in* or *as* objects. At the same time, its account of historical materialism stands in contradiction to the temporally frozen objectification of material culture *as* "law." Here materiality is conceived as the moment of the creation of legal difference through a folded-in temporal recognition of the significance of a matter, or in Benjamin's own words, "[I]mage is that wherein what has been comes together in a flash with the now to form a constellation."[48] A Benjaminian materiality accounts for the multitude of things, objects, and images because they reveal something about the observer who "creates" them anew by affording attention to them. Materials act as entry points into a historical inquiry into the meaning of legal difference, but they can never be fully known.[49] Rather than a collection or a museum of past objects, legal materials are instead cast as present, creative subjects. They are co-creators of legal difference arising in the present through temporal dialectics, rather than stable, bounded objects of contemplation. Legal materiality from this Benjaminian vantage point is historical in a temporally folded way, and does not necessarily understand materiality to encompass only materials of physical substance or temporally "dead" things.

Tomlins's Benjaminian materiality develops a mode of inquiry from the viewpoint of the legal historian. In this sense, it inhabits a different register of observation than Vismann's and Pottage's understanding of materials that condition legal difference from within legal practice. For Tomlins, materials are epistemological instruments for the scholar, who takes them as entry points into the history of legal fabrication. For Pottage, materials shape the doubly contingent reproduction of the legal; they are the "raw elements” that are “assembled into *dispositifs*.”[50] Both grant that law establishes a difference, and that legal scholarship should attend to the materials that give form to legal difference in particular ways.

2.4 Conclusion: Legal Materiality as a Mode of Inquiry

The legal materialist approach proposed in this chapter is informed by the preceding theoretical discussions of law as an evolving succession of emergent, temporally folded-in differences that are shaped by its materials. We conclude by considering the implications of these theoretical discussions, clarifying and delineating the key concepts of p. 34 ↳ matter, materials, and materiality, and formulating the details of such a mode of legal scholarly inquiry.

Materiality refers to the legal meaning or quality of the elements that fabricate law. It does not presume the existence of law as a pre-human “mode of existence” or as an indistinguishable reality from society or politics. Rather, law is a process of making and stabilizing differences, which only make sense and have an effect within a *dispositif* composed of legal enunciations. Enunciations are composed of signs and materials bound together by a common mode of differentiation. Luhmann referred to this as a “code” of communication, and Foucault described it as a “game” of the *dispositif*: “These elements, whether they are discursive or non-discursive, are linked by something like a game.”[51] Law as an *énoncé* is the material difference that causes these elements to stick together rather than an assemblage of the elements comprising it. At the same time, law would not exist without those constitutive elements. Drawing upon these observations, legal materiality approaches law by deconstructing and recomposing a legal matter as a Foucauldian problematization[52] or an unstable “matter of concern,” in Latourian terminology, that is enlisted in the legal “game.”[53] This approach observes how certain elements mobilize and condition legal meaning by simultaneously serving as law’s material conditions and as the embodiments of legal matters themselves. It investigates the properties of those legal materials. Legal materiality is better described as a mode of understanding law’s composition and relationality.

Legal materiality operates on multiple, looping levels of analysis or observation: on the one hand, as an observation of the materials which compose the “legality” of a “legal matter” at the level of juridical practice, and on the other, as a self-reflection of the legal scholar who selects, delineates and interprets such an articulation of “the legal.” Legal materiality heeds Foucault’s call to examine the relations *between* the elements of an assemblage or a *dispositif*, bringing textual and linguistic elements together with material structures, such as architectural forms and institutional locations. It seeks to investigate what Foucault described as “precisely the nature of the linkage that exists between these heterogeneous elements” in a *dispositif*.[54] Identifying, concretizing, and interpreting such a “nature of the linkage” between the various legal materials within the p. 35 ↳ regime of legal enunciations are tasks for the legal scholarly observer, who is drawn into differentiating, interpreting, and producing the relations between specific objects and their legal relevance. The potential of a legal materialist approach depends upon the ability of the scholarly interpreter to observe, distinguish, and reassemble the legal *dispositif* by attending to the specificities of material elements of legality engaged in the legal “game.”

Which materials ought to be studied through legal materiality? What counts as an element in the legal network or *dispositif*, what materials have and exert legal significance, and what is their relative contribution to the making of legality, the force of law, in a given situation? If we start from the premise that the attribute “legal” exists precisely in order to produce and establish legal difference—a particular discourse and distinct practices in relation to other social practices—we turn our gaze to the materials that are referred to as “legal.” A legal materialist strategy takes the surface of the nomenclature of “legal” as the legal real “without ascribing or assuming a normative or truth value to the word ‘legal’ ”. By taking the surface, appearance, or forms as legal materials, legal materiality proposes to look at concrete situations in which materials become involved in legal relations and are transformed into specifically *legal* materials. Their degrees of legality may vary: a material may be more or less enlisted by law in a given situation.

The legal materialist mode of inquiry begins from identifying law’s materials that contribute to the making of legal difference, as opposed to understanding legal meaning by explaining law through its various contexts. It attends to the choice of particular legal elements, their assembly, and the overall shape of the montage. The scholarly level of legal materialist observation perceives the differences between legal materials, interprets their relative weight in the composition of law, and draws relations between these heterogeneous elements. The materialist scholar-observer would attend to the unique qualities of each material and its distinct uptake into law: a courtroom is different from conferencing software; a video clip is a different material from a photograph; a file is distinct from a book. Taking materiality seriously commits the scholar to account for the specificities of materials that shape legal meaning, rather than assuming them to be legal contexts that are somehow self-evident. Legal materiality attends to materials which *matter* to law but is careful not to reify or naturalize them or to reduce them to products of interpretation. The distinct legal attributes of materials or “objects” are products of historical epistemic categorizations and several layers of mediation. They are articulated, perceived, and materially composed.[55] A legal materialist approach is thus not only doubly contingent but triply so from the point of view of the scholar themself: it entails the impossibility of fully “knowing” the ontology of legal materials, law’s present position within a non-linear, self-reflexive temporality, as well as the precise reality of the interrelations of elements that compose law. A legal materialist approach p. 36 ↳ can at best offer an approximation of the legal fabric, yet it appears as the clearest mode of conveying law’s distinctness and the relations between its elements in light of the problem of dedifferentiation inherited from poststructuralism.

As Nietzsche observed, “our writing instruments contribute to our thoughts”[56]: the recording devices and technologies used to produce legal texts also shape law’s formal and institutional archive. Law’s words, texts, and utterances have been recorded, transmitted, and shaped through their materials and techniques of inscription, such as stones, scrolls, models, paper files, and books. What is the role of text and language in such a legal materialist approach? Are physical elements and language equally influential? Foucault’s *dispositif* is discursive, and it gives epistemic primacy to human language by understanding the “apparatus” to be composed of enunciations, such as elements of speech and silence: “what is said as much as what is unsaid.”[57] If legal materiality is conceived as a Foucauldian *dispositif* of enunciation or as a Luhmanian network of distinctly coded contingent communication, the primary legal material is certainly language, yet this does not preclude non-linguistic signs—such as images, sounds, and films—from contributing to the production of legal meaning. Heterogeneous materials also condition the making of legal differentiation: law’s recording media, such as paper, files, binders, libraries, reports, and computers; spatial settings of court rooms, administrative buildings, and prisons; the particularity of legal forms (both in tangible and intangible senses) and their diagrammatic formats; and rhetorical and physical techniques of legal inscription. The legal *dispositif* could also encompass *énoncés* of intangibles, such as mathematical formulae, flows of movement within a building, and institutionalized customs. Increasingly legal meaning is mediated through algorithms and statistical models, as in the case of transnational surveillance networks and criminal digital databases. As the material dimensions of law have shifted with different technologies and media, a legal materialist approach takes into account how these materials affect the meaning of legal matters and processes, such as responsibility, guilt, privacy, evidence, access to justice, customs, and properties. From this perspective, the traditionally presumed dichotomy between textuality and physical materiality appears instead as a spectrum, with caricatures on both ends: legal materiality works with and between texts and materials in order to understand their complex relations in the production and reproduction of law. Legal materiality is therefore a proposition to extend the scope of legal hermeneutic scholarship to non-human materials by exploring the relationships between things and language that informs, configures, and shapes law as it constitutes itself. In light of this extended notion of materials, legal materials may perhaps be better understood as meaningful artefacts or entities rather than texts or language. The challenge to the scholar or observer of law is to trace the ways in which these heterogeneous materials come to matter for law; that is, how they are enlisted in legal matters.

p. 37 Rather than offering a determinist explanation, whether materialist or ideational, the legal materialist approach takes care not to collapse into either a materialist determinism or a hermeneutic self-referentiality. The former presumes that things are self-evident and that they determine legal meanings; the latter would seek to explain legal difference or “law” through an unmediated identification of “the legal” with “the social.” A legal materialist mode of inquiry mediates between these two poles by focusing on concrete materializations of legal language as well as the non-linguistic conditions of law’s production and enactment. It combines an attunement to law as a hermeneutic “game” in a Foucauldian sense with Vismann’s awareness of law’s constitutive physical materials that *come to matter*—that is, have meaning—in and for law. Put another way, legal materiality can be understood as a legal mattering (v): to matter; to acquire meaning and significance.

Further Reading

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Notes

1 James Porter, “Materialism,” *Oxford Classical Dictionary* (Oxford: Oxford University Press, 2016), 4.

2 Nietzsche famously diagnosed a shared anti-material, this-worldly metaphysical presumption in both Platonism and Christian thought, though in Platonism the “real” world was attainable to the philosopher, whereas in Christian theology it was reserved for the afterlife; see in particular Friedrich Nietzsche, “How the ‘Real World’ at Last Became a Myth,” in *Twilight of the Idols/The Anti-Christ* (London: Penguin, 1968), 50–51.

3 Peter Fitzpatrick, “Legal Theology: Law, Modernity, and the Sacred,” *Seattle University Law Review* 32 (2009): 321–341.

4 See in particular Nietzsche, “Morality as Anti-Nature,” in *Twilight of the Idols/The Anti-Christ* (London: Penguin, 1968), 52–57.

5 See Friedrich Nietzsche, *The Will to Power* (New York: Vintage, 1968), and *Beyond Good and Evil* (London: Penguin, 1973).

6 Friedrich Nietzsche, “On Truth and Lies in a Nonmoral Sense,” in *Philosophy and Truth: Selections from Nietzsche’s*

Notebooks of the Early 1870s (Atlantic Highlands, NJ: Humanities International Press, 1990), 79–97, 79.

7 For example, Nietzsche claimed that "the entire distinction" between the inorganic and the organic world "is a prejudice." Nietzsche, *Will to Power*, 346.

8 Christoph Cox, *Nietzsche: Naturalism and Interpretation* (Berkeley: University of California Press, 1999), 238, quoting Nietzsche, *Will to Power*, 339.

9 See generally Diana Coole and Samantha Frost, eds., *New Materialisms: Ontology, Agency, and Politics* (Durham, NC: Duke University Press, 2010).

10 On the influence of Darwin, Nietzsche, and Bergson on new materialist understanding of the body, see Elizabeth Grosz, *The Nick of Time: Politics, Evolution, and the Untimely* (Durham, NC: Duke University Press, 2004). In her later work, Grosz has turned to the limits of materialism and the necessity of "incorporeal" force preceding physical matter or bodies in *The Incorporeal: Ontology, Ethics, and the Limits of Materialism* (New York: Columbia University Press, 2017).

11 Michel Foucault, *Power/Knowledge: Selected Interviews & Other Writings, 1972–1977*, ed. Colin Gordon (New York: Pantheon, 1980), 194–195.

12 For arguments for an embodied consciousness, see Antonio Damasio, *Descartes' Error* (New York: Grosset Putnam, 1994); on human distributed cognition in environment, see Andy Clark, *Being There: Putting Brain, Body, and World Together Again* (Cambridge, MA: MIT Press, 1998); on human epistemic engineering of the environment in an evolutionary perspective, see Kim Sterelny, *Thought in a Hostile World: The Evolution of Human Cognition* (Oxford: Blackwell, 2003).

13 Antonio Damasio, *Looking for Spinoza: Joy, Sorrow and the Feeling Brain* (New York: Harcourt, 2003).

14 Coole and Frost, *New Materialisms*, 2.

15 For example, Jane Bennett draws upon Aristotle, Spinoza, Driesch, Bergson, and Deleuze to articulate a vitalist account of matters; see *Vibrant Matters: A Political Ecology of Things* (Durham, NC: Duke University Press, 2010). On the difficulty of transposing biologicist understandings into legal conceptualizations, see Hyo Yoon Kang, "Law's Materiality: Between Concrete Matters and Abstract Forms, or How Matter Becomes Material," in *Routledge Handbook of Law and Theory*, ed. A. Philippopoulos-Mihalopoulous (London: Routledge, 2018), 453–474.

16 Karl Marx, *The German Ideology*, Part 1, Theses on Feuerbach, 1845, https://www.marxists.org/archive/marx/works/1845/german-ideology/ch01a.htm.

17 Maurizio Lazzarato, *Signs and Machines* (Cambridge, MA: MIT Press, 2014).

18 See generally Marianne Constable, *Our Word Is Our Bond: How Legal Speech Acts* (Stanford, CA: Stanford University Press, 2014).

19 Luc Boltanski and Laurent Thévenot, *On Justification: Economies of Worth* (Princeton, NJ: Princeton University Press, 2006).

20 Bruno Latour, *The Making of Law: An Ethnography of the Conseil d'État* (Cambridge: Polity, 2010), 276.

21 James Boyd White, "Reading Texts, Reading Traditions: African Masks and American Law," *Yale Journal of Law & the Humanities* 12 (2000): 117–127, 123. More generally, see James Boyd White, *The Legal Imagination* (Chicago: University of Chicago Press, 1973).

22 Susan S. Silbey and Patricia Ewick, *The Common Place of Law: Stories from Everyday Life* (Chicago: University of Chicago Press, 1998). What legality means in a particular situation would rest ultimately with the legal scholar's observation: "The schemas of legality are the researchers' constructs, abstracted from their respondents' accounts and resynthesized into narratives of legality they label 'before,' 'with,' and 'against,' the law"; see Susan S. Silbey, "After Legal Consciousness," *Annual Review of Law and Social Science* 1 (2005): 323–368, 348.

23 Ruth A. Miller, *Seven Patterns of Threatening Speech* (Ann Arbor: University of Michigan Press, 2011), and *Snarl: In Defense of Stalled Traffic and Faulty Networks* (Ann Arbor: University of Michigan Press, 2013).

24 Cornelia Vismann, *Files: Law and Media Technology* (Stanford, CA: Stanford University Press, 2008); Latour, *Making of Law*.

25 Oscar Guardiola-Rivera, "Return of the Fetish: A Plea for a New Materialism," *Law and Critique* 18 (2007): 275–307. This claim would not seem to apply to Gunther Teubner's earlier query into whether non-human entities such as computers and animals can be recognized as agents in and by law; see "Rights of Non-humans? Electronic Agents and Animals as New Actors in Politics and Law," *Journal of Law and Society* 33 (2006): 497–521.

26 For a feminist legal theoretical engagement with the potentials of new materialist theories, see Joanne Conaghan, "Feminism, Law and Materialism: Reclaiming the 'Tainted' Realm," in *The Ashgate Research Companion into Feminist Legal Theory*, ed. Margaret Davies and Vanessa E. Munro (Abingdon, U.K.: Routledge), 31–50.

27 Samantha Frost, "The Implication of the New Materialisms for Feminist Epistemology," in *Feminist Epistemology and Philosophy of Science: Power in Knowledge*, ed. H. E. Grasswick (Dordrecht, The Netherlands: Springer, 2011), 69–83.

28 *Law and the Question of the Animal*, ed. Yoriko Otomo and Edward Mussawir (Abingdon, U.K.: Routledge, 2013); *Law and Ecology: New Environmental Foundations*, ed. Andreas Philippopoulos-Mihalopoulos (Abingdon, U.K.: Routledge, 2011).

29 *Autonomic Computing and Transformation of Human Agency*, ed. Mireille Hildebrandt and Antoinette Rouvroy (London: Routledge, 2011).

30 James Porter, *Acoustic Jurisprudence: Listening to the Trial of Simon Bikindi* (Oxford: Oxford University Press, 2015).

31 Andreas Philippopoulos-Mihalopoulos, “Flesh of the Law: Material Legal Metaphors,” *Journal of Law and Society* 43 (2016): 45–65; Sara Ramshaw, *Justice as Improvisation*: *The Law of the Extempore* (London: Routledge, 2013).

32 An edited collection on international law read in this fashion considers a diverse array of legal objects; see *International Law’s Objects*, ed. Jessie Hohmann and Daniel Joyce (Oxford: Oxford University Press, 2019).

33 Pierre Schlag, “The Dedifferentiation Problem,” *Continental Philosophy Review* 42, no. 1 (2009): 35–62. If the commonly accepted premise of law’s embeddedness in society in poststructuralist and socio-legal studies holds, referencing society cannot offer an intelligent explanation of the legal, as the legal already forms part of it.

34 Tomlins describes the total contextualization dominant in legal historicist and sociolegal styles as “a style whose fetishization of contextual contingency and complexity substitutes Geertzian thick description for both structural and causal explanation.” “Historicism and Materiality in Legal Theory,” in *Law in Theory and History: New Essays on a Neglected Dialogue*, ed. Maksymilian Del Mar and Michael Lobban (London: Hart, 2016), 57–83, 64.

35 For examples of such a theoretical approach applied to legal materials, see (in order of publication): Annelise Riles, *The Network Inside Out* (Ann Arbor: University of Michigan Press, 2000); *Documents: Artifacts of Modern Knowledge*, ed. Annelise Riles (Ann Arbor: University of Michigan Press, 2006); Cornelia Vismann and Markus Krajewski, “Computer Juridisms,” *Grey Room* 29 (2007): 90–109; Alain Pottage and Brad Sherman, *Figures of Invention* (Oxford: Oxford University Press, 2010); Javier Lezaun, “The Pragmatic Sanction of Materials: Notes for an Ethnography of Legal Substances,” *Journal of Law and Society* 39, no. 1 (2012): 20–38; Hyo Yoon Kang, “Science Inside Law: the Making of a New Patent Class in the International Patent Classification,” *Science in Context* 25, no. 4 (2012): 551–594; Brenna Bhandar, “Title by Registration: Instituting Modern Property Law and Creating Racial Value in the Settler Colony,” *Journal of Law and Society* (2015): 253–282; Sara Kendall, “Archiving Victimhood: Practices of Inscription in International Criminal Law,” in *Law, Memory, Violence: Uncovering the Counter-Archive*, ed. S. Motha, S. and H. van Rijswijk (London: Routledge, 2015), 156–176; Jose Bellido, “Forensic Technologies in Music Copyright,” *Social and Legal Studies* 25, no. 4 (2016): 441–459, Jose Bellido and Hyo Yoon Kang, “In Search of a Trade Mark: Search Practices and Bureaucratic Poetics,” *Griffiths Law Review* 25, no. 2 (2016): 147–171; Marie-Andrée Jacob, “The Strikethrough: An Approach to Regulatory Writing and Professional Discipline,” *Legal Studies* 37 no. 1 (2016): 137–161; Fabian Steinhauer, “Kulturtechniken des Rechts,” in *Formate der Rechtswissenschaft*, ed. A. Funke & K. Lachmayer (Weilerswist-Metternich: Velbrueck Wissenschaft, 2017) 255–274; Hyo Yoon Kang, “Ghosts of Invention: Patent Law’s Digital Mediations,” special issue, *History of Science*, 57, no. 1 (March 2019): 38–61 (first published April 30, 2018), https://doi.org/10.1177/0073275318770773; Thomas Vesting, *Legal Theory and the Media of Law* (Cheltenham, U.K.: Edward Elgar, 2018).

36 Vismann, *Files* and also Cornelia Vismann, *Medien der Rechtsprechung* (Frankfurt, Germany: Fischer, 2011); Friedrich Kittler, *Discourse Networks 1800/1900* (Stanford, CA: Stanford University Press, 1990), and *Gramophone, Film, Typewriter* (Stanford, CA: Stanford University Press, 1999).

37 See Latour, *Making of Law*; Bruno Latour, *An Enquiry into the Modes of Existence* (Cambridge, MA: Harvard University Press, 2013).

38 Scientists connected claims of veracity into a “chain of reference” which stabilized these claims into a fact. Latour, *Laboratory Life*; Bruno Latour, *Science in Action* (Cambridge, MA: Harvard University Press, 1988). For a comprehensive overview and accounts of (mis)applications of actor network theory, see Javier Lezaun, “Actor Network Theory,” in *Social Theory Now*, ed. Claudio Benzecry, Monika Krause, and Isaac Ariail Reed (Chicago: University of Chicago Press, 2017), 305–336.

39 Alain Pottage, “The Materiality of What?,” *Journal of Law and Society* 39 (2012): 167–183, 168.

40 For a critique of the equation of matters with materials and of the presumption of matters as self-evident, see Kang, “Law’s Materiality.”

41 Latour, *Making of Law*, 253.

42 Pottage, “Materiality of What?,” 170.

43 Ibid., 177.

44 Latour, *Making of Law*, 276: “a mode of exploration of being, a particular mode of existence, and that it has its own ontology, that … engenders humans without being made by them.”

45 For a trenchant critique of the collapse of differentiating categories in Marxist historical materialism and Critical Legal Studies, see Christopher Tomlins, “Toward a Materialist Jurisprudence,” in *Transformations in American Legal History: Law, Ideology and Methods—Essays in Honor of Morton J. Horwitz, Vol. II*, ed. Alfred Brophy and Daniel Hamilton (Cambridge, MA: Harvard University Press, 2010), 198–200. On why “society” as an explanatory reference for “law” does not make sense, see Bruno Latour, “When Things Strike Back: A Possible Contribution of ‘Science Studies’ to the ‘Social Sciences,’ ” *British Journal of Sociology* 51 (2000): 107–123.

46 Niklas Luhmann, *Social Systems* (Stanford, CA: Stanford University Press, 1995). Luhmann understood sociality as a shifting web of different modes of communication, of which law is only a part. If Legendre conceives society as texts (*De la*

société comme texte: Linéaments d'une anthropologie dogmatique (Paris: Librairie Arthème Fayard, 2001)), Luhmann understands society as an ensemble of different modes of distinct communication, which are able to coexist despite their differences because of their productive misunderstanding. According to Luhmann, communication does not entail transmission but is unstable because it consists of three elements which do not necessarily have to be all present: information, message and understanding. "What Is Communication?," *Communication Theory* 2 (1992): 251–259.

47 Tomlins, "Historicism and Materiality in Legal Theory," 74.

48 Ibid., 76. Quoting Walter Benjamin, *The Arcades Project*, trans. Howard Eiland and Kevin McLaughlin 463 (Cambridge, MA: Harvard University Press).

49 Tomlins, "Historicism and Materiality in Legal Theory," 65: "True historicism—absolute différance—would have to deny the possibility that its object of attention is intelligible, rendering it a species of antiquarianism."

50 Pottage, "Materiality of What?," 181.

51 Foucault, *Power/Knowledge.* These notions resemble Hart's notion of law consisting of "an internal point of view," but Foucault and Luhmann would not take the existence of such an "internal point of view" as a given, so that the question instead becomes how exactly such an internal view materializes and is constructed. The internal point of view and its contingency would be the site of problematization.

52 "Problematization doesn't mean the representation of a pre-existing object, nor the creation through discourse of an object that doesn't exist. It is the totality of discursive or non-discursive practices that makes something into the play of the true and false and constitutes it as an object for thought (whether under the form of moral reflection, scientific knowledge, political analysis, etc.)." Michel Foucault, "'The Concern for Truth': Interview with Francois Ewald," in Foucault, *Politics, Philosophy, Culture. Interviews and Other Writings, 1977–1984,* ed. Laurence Kritzmann (New York: Routledge, 1988): 255–267, 257.

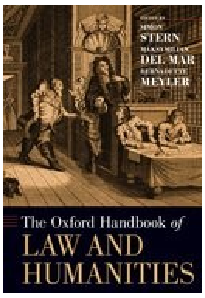
53 Bruno Latour, "Why Has Critique Run out of Steam? From Matters of Fact to Matters of Concern," *Critical Inquiry* 30 (2004): 225–248.

54 Foucault, *Power/Knowledge*.

55 The challenge of this proposition consists in drawing out the effect of materials on the legal form. One example of such an approach is Marta Madero's study of the determination of ownership of pictures by reference to value of material pigments used on canvas rather than a top-down application of the legal categories of artistic originality and authorship. See Marta Madero, *Tabula Picta: Painting and Writing in Medieval Law* (Philadelphia: University of Pennsylvania Press, 2009).

56 Nietzsche, Letter toward the end of February 1882, in *Briefwechsel: Kritische Gesamtausgabe*, ed. Giorgio Colli and Mazzino Montinari 25 vols., (Berlin, Germany: Walter de Gruyter, 1975–1984), pt. 3, I: 172, quoted in Kittler, *Discourse Networks*, 200.

57 Foucault, Power/Knowledge, 194.



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CHAPTER

3 Law, Visual Studies, and Image History

Carolin Behrmann

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Abstract

This chapter argues that normative orders are not simply represented but made through visualities. Rather than just having a subversive purpose, images, symbols, gestures, and performative actions are able to generate legal meaning; this has been discussed since early Renaissance. The reason for the troubled relationship between law and visuality is connected to the long history of skepticism toward the authenticity of images. This chapter looks into the ties between the law and image history and shows that visual media have to be counted as a crucial part of the legal sphere. Both aesthetic knowledge and aesthetic signification of legal normativity have a long historical record. The chapter argues that since the law deploys visual media in different contexts, critical instruments and theoretical approaches must be able to deal with the epistemological qualities of images.

Keywords: aesthetics, legal archaeology, iconology, image history, normativity, optical media, sign theory, spectacle, theory of symbols, visual literacy

Subject: Jurisprudence and Philosophy of Law, Law and Society, Law

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3.1 Iconic Logos

THE history of research in the field of law and the visual has brought forth numerous, albeit diverging and sometimes contrasting, approaches. While the ubiquity of vision as the master sense of the modern era has a long historical record, legal studies has regarded the products of the visual legacy primarily with suspicion. Hence, images in law adhere to a “paradoxical foundation” of the Western legal institution, with a “troubled relationship” to legal normativity that has kept its own order of images invisible.[1] A radical transformation, through a wide diffusion of computer-generated imagery and techniques, fundamentally reconfigured modes of seeing and visuality.[2] However, despite the general increase in optical media and debates about the status of images since the 1960s, images in law have until recently been regarded as secondary phenomena that have “subversive potential” rather than offering an alternative to normative theories founded on pure methods of legal cognition. A consensus prevailed that rhetoric and text generate legal meaning through the linearity and logos of the order of words, which serve as vehicles for coherent thought, whereas imaging and the visual sense were incompatible with reflection and served to create distance from the reality of legal ↳ practice.[3] Today, primarily for the law, military, media, and politics,
p. 40 “images, that had once been secondary phenomena—treasured and fostered, though also subject to criticism and sometimes even forbidden—have now advanced to primary status.”[4] Therefore the law, which constantly deploys visual media for didactic purposes—as evidence in court, in copyright disputes, for evaluating the infringement of personality rights, and inciting insurrection against lawful authority—now more than ever needs critical instruments and theoretical approaches for dealing with visual phenomena.[5] Normative orders, as will be argued, are not simply represented but are created through visualities, images, symbols, gestures, and performative actions.

Law’s troubling problem with images is grounded in the idea of an authentic epistemological origin, rating textual literacy higher than visual literacy, and assigning less significance to the visual than to the analytical language of legal evidence and evaluation. The exclusion of visuality from the incessant written proliferation of legal information has a long historical tradition of negative dialectics, including Platonic skepticism about the epistemic quality of images, theological debates on idolatry, religious iconoclasms, and “iconoclashes” manifesting uncertainty about iconoclastic acts[6]; similarly, because of their use as a corruptible medium of political propaganda, their inherent ambiguities, and the emotional responses they elicit in legal practice, images have often been treated as object of destructive critique. However, their epistemological ambiguity can also consolidate the power of law, which must distinguish the orders of unseen or absent causes, to define the order of true reference. Sensible impressions would cede to abstract notions in law to secure the abstract logic of the institution, as Peter Goodrich has described it[7]:

> The image played the law, either as the word, the inner sign of a dual nature, or as a figurative representation. In either case, whether it was the text alone, word, sacrament (*verba visibilia*), or statuary figure that governed the direction of vision, the law had to dictate the terms of legitimate signification so as to command the mystery, faith, grace, or meaning that escapes … the dead letter of prose.[8]

Contrary to law’s supposed immunity to images, a multiplicity of tropes which describe ways of normative
p. 41 control of the visual or the economy of permitted and prohibited ↳ images has been used to conceptualize the production of legal normativity.[9] To give only a few examples, consider the term “panopticism” as a device of surveillance and disciplinary strategies (Jeremy Bentham), the “spectacle” and “display” of power (Michel Foucault), the “scopic field” as a dimension of the gaze that is split into visible and invisible, the reversibility of the seer and the seen (Maurice Merleau-Ponty), and the “mirror” as “threshold of the visual world” and “debut of all cognition” (Jacques Lacan, Pierre Legendre). Other specular metaphors in hermeneutic theories question the mirror as a metaphor for reason and normativity linked to the logic of

representation (Richard Rorty), and the idea of “scopic regimes” (Martin Jay) that refer more generally to visual experiences mediated through technologies, such as photography, film, television, and the digital.[10] Finally, consider also the theoretical implications of “simulation/simulacra” (Jacques Derrida, Gilles Deleuze, Jean Baudrillard), that mean rather repetitions without model or original, bearing the danger that the law claims truth but is far from reality and “always suggests, over and above its object, that law and order themselves might really be nothing more than a simulation.”[11]

Along with what has been called the “pictorial” or “iconic turn,” there has also been a growth in research on images and visual phenomena in the field of legal studies. As a reaction to the belief in the primacy of linguistic faculties that also turned phenomenal experience into the product of language, visual studies has called into question the role of all kinds of images in culture, from high to low, from paintings to video and digital images,[12] from artworks and craft to machine-produced artefacts and modern manufactured goods.[13] The focus on a “visual culture” has meant that, in addition to objects of sight, the analysis of the process of seeing has emphasized the constructed nature of vision and the constitutive practices of the social that produce a “common sense.” In the field of “image science” works of art, images, and representations do not set the boundaries; instead, that is achieved by the “iconic,” which embraces the complexity of images in a phenomenological sense.[14] The concept of an “iconic difference” (Boehm) tries to ascertain the image “as itself,” in its autonomy, its “iconic logos,” and investigates processes of image recurrence and emergence independently from mediality and context.

p. 42 Explicitly or not, through these concepts which drove the pictorial/iconic turn, visuality in law accrued to an epistemic field that produces legal sense through images and objects. Legal studies realized that placing a taboo on the sensual would cover only one aspect of the law as a social system of communication.[15] Concurrently, symbols, rituals and dress, deictic signs, iconography, and design and architecture became objects that formed institutional systems by aesthetic means. This broader concept of visuality, which connects the cognitive, the aesthetic, and the normative, has set the grounds for understanding the law embedded in a larger cultural context, and has recently encouraged several textbooks with different approaches to the visual field.[16]

Robert Cover described the aesthetic realm as a “nomos we live in,” which provides “an integrated world of obligation and reality from which the rest of the world is perceived.”[17] Law communicates in the logic of legal arguments but relies notwithstanding on the operation of the image if it comes to express unity in the regulation of a society. The iconic logos constitutes a normative or aesthetic-dogmatic framework of images, which also functions as cohesion of social experience.[18] Visual tools and vehicles are both scientific (optics) and fictitious. To give an example from the scientific rationalization of space: the constructions of space following the laws of perspective are directed toward an ideal point in which all the lines converge, creating a fictive space and breaking the hold of any imaginary or immediate relation to the world, interposing a binding structure on which the reality of the scene (or the system) represented depends. They reflect upon reality and describe it, obliging the viewer to submit to perspectival laws.[19] According to Pierre Legendre, the space of fiction here “insinuates the idea that the aesthetic enunciates something that evades objective understanding.”[20] Other theories that define the aesthetic foundations of law have emphasized
p. 43 that questions ↳ of fictionality are closely entwined with the question of the image, regarding the development of crucial figures of the law (e.g. the “person”).[21]

In a nutshell, the growing field of visual research and studies expands into at least three branches: the analysis of “legal fictions or imaginations” that allegorize, symbolize, or narrate; “legal aesthetics,” which describes how the law acts through aesthetics and representational devices (perspective, mimesis, verisimilitude); and “law’s sensorium,” referring to all sensorial or material phenomena that have an effect on the normative order of the visible and the act of seeing. But before elaborating further on attempts to conceptualize such a wider aesthetic knowledge, or aesthetic signification of legal normativity, it will be useful to epitomize the historiographical consequences of the broader field of images and artifacts that have been studied as "visual manifestations" in law.

3.2 Spectacles of Law

In *The Art of Building* the Renaissance humanist Leon Battista Alberti, who was trained in civil and canon law, devotes an extensive passage to various examples of the relations between ornament and legal custom. He emphasizes that ornament is essential not only to the building itself but to its operation.[22] Claiming an identity between representation and reality, Alberti follows a general tendency in early Humanist thought in which the built environment was used as historical evidence for human action.[23] Here resounds the Aristotelian notion of the lawgiver (*nomothetês*), who does not simply frame the Constitution through enduring laws, institutions, customs, and moral education but also maintains it through legislative science. His task is compared to that of a craftsman, who produces artefacts through material, formal, efficient, and final causes. Architecture, as a product of a making process (*technê*), is the substantiation of matter defined through the activity of its use, how it fits with its purposes for which it was designed, and its circumstances.[24]

The ancient definition of *technê* or *ars* embraces both the nature and genesis of artistic conception and its relation to sensation and intellect (speculative and practical), p. 44 ↳ which leads further into the exploration of the ties among artistic form, historical evidence, and legal action. Buildings and monuments with a legal function not only serve as vehicles of written laws but incorporate elements of performativity and memoralization that carve out a "public space for the contemplation of justice" and its ritual staging.[25] Judicial architecture and the iconography of medieval and Renaissance courtrooms acted instructively, directing the judgmental processes of the members of the court "to fear God and rulers whose laws judges ought not risk disobeying."[26] But the tradition of representations and iconographies in court architecture has generally become obsolete. Aniconic designs that serve and epitomize efficient administration and legal practice, and architectures of transparency, have permeated and displaced imagery that communicated the requirements of impartial, accessible, and fair judgment in law.

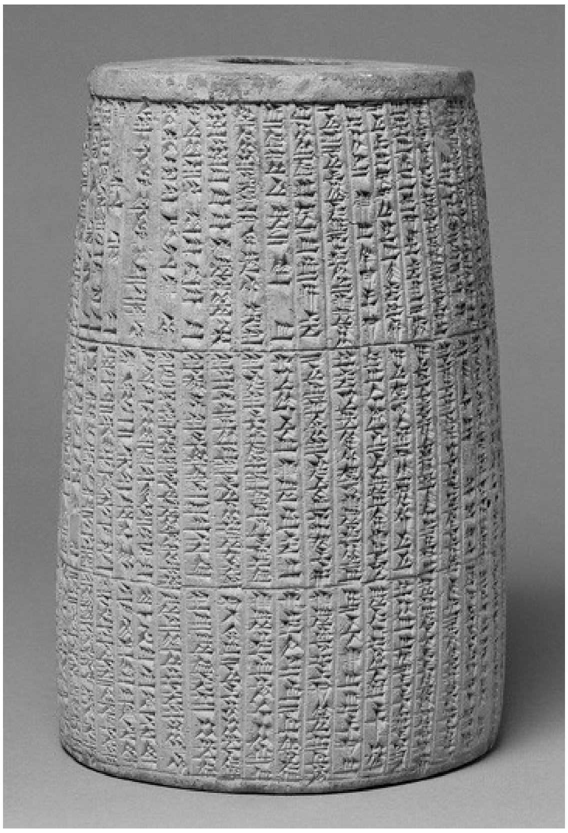
Although significant parts of the history of the "legal spectacle" might be still unwritten, both art history and legal history have a long tradition of analyzing artworks and artefacts in the legal domain. Apart from the analysis of court architecture and public spaces that served legal purposes, legal iconography concentrated on the emblematic, symbolic, and allegorical (personifications of law and justice, sword and balance); sovereign effigies (numismatics, monuments, sepulchers); metonymic images such as *regalia* (crown, cross, scepter) that have both theological and legal value; heraldry, mnemonic images, and illuminated manuscripts (decretals, codices); and the ceremonies, rituals, and appearances of law's visual presence.[27] Especially the iconography of distinct legal cultures, such as, for example, Babylonia (Hammurabi), late Medieval and early Renaissance city-states in Italy (Siena), the French Revolution, and the rise of legal architecture in the nineteenth century, have been studied as artefacts of legal culture in different respects and in more detail than others.

Law's iconic logos has various facets and dimensions that can only be roughly outlined here, with particular attention paid to their applicability in different historical contexts. A more general legal iconography analyzes the trope of personification such as the female figure of "Iustitia" and her attributes sword and scales, and the all-seeing "Eye" which bestows unity on law, within a representational realm.[28] Images of justice (*Gerechtigkeitsbilder*) with theological as well as philosophical meaning have been p. 45 ↳ interpreted in regard to their iconological complexity, as well as images that picture concrete scenes of penal justice.[29] However, to adumbrate the broad dimension of the field of law's visuality, the vast field of treatises and their material dimension was much older than the tradition of the printed law codes (Figure 3.1).

p. 46 Illuminations of legal treatises served not only as accompanying images but also as vehicles for explaining
and underlining concepts and abstract laws (Figure 3.2).[30] Vision and the act of seeing—and ↳ also law's
blindness, which should secure its impartiality over a case—have been topics providing visual evidence for
the notion of justice in various historical and cultural contexts.[31] Following the emblem tradition,[32] the
analysis of illustrations and illuminations of law treatises has emphasized the historical tradition of a visual
p. 47 legal literacy, ↳ especially in regard to learning and practice which applies the law to different cases.[33]
Medieval legal practice developed the *ars memoria* tradition with a close relation between word and image.
The text was interpreted as an image in which visual connections between main text and commentary *glossa*
helped to memorize, institutionalizing the law, creating a practical tool to make moral judgment possible
(Figure 3.3).[34] Furthermore, initials and miniatures in medieval law treatises, expressing particular artistic
values, have been attested as having significance for the general comprehension of legal sense (Figure
p. 48 3.4).[35] Images in treatises such as Bartolus's *Tyberiades* served to ↳ demonstrate mathematical principles
for surveying watercourses for judgment in cases of proprietary rights.[36] Also closely connected are the
maps of early forensic geography, which were part of the court files that included visual evidence of a case to
explain or supplement oral testimony (Figure 3.5).[37] Another type of legal image can be found in pictures
that follow a schematic or diagrammatic logic, such as the *arbores consanguinitatis* which contain rules and
diagrams for reckoning consanguinity and affinity (Figure 3.6). Diagrammatic images such as maps,
graphs, and charts are pictorial, yet abstract, and have entered legal visuality in different ways, forming a
special category that has relevance for the use of images up to the present.[38] Studies of legal spaces and the
p. 49 structure of visual orders look into interior and exterior decorations and the *Gestaltung* of courtrooms ↳
and public spaces.[39] Spectacles that relay the "site and space of legality" (Goodrich) have been found in
different visualities, such as large mural decorations in courtrooms with complex allegorical meanings
related to the process and act of judgment, and also in ephemeral defamatory images of condemned persons
(*pitture infamante*) and pillories that constituted legal spaces (Figure 3.7).[40] The central aim of these images
of justice involved their visual capacity to "instill awe and respect for the authority and operation of law, its
procedures, its institutions and personnel," and also to deter its subjects from criminal conduct, showing
that any unlawful behavior was liable to punishment.[41] The theological and legal significations of this
imagery can scarcely be differentiated (Figure 3.8). Secular and religious authorities used tradition to
p. 50 legitimize their power through visual narratives of justification of their power, which placed both forms of
↳
p. 51

↳
authority within a single divine natural law.[42] Only in the late eighteenth century did systematic approaches
to codification seek to orient jurisprudence toward the exact natural sciences, as in the work of Gottfried
Leibniz, who planned a codification of law of the German Empire with "geometric certainty" that would
comprise all rules of law corresponding to human nature.[43]

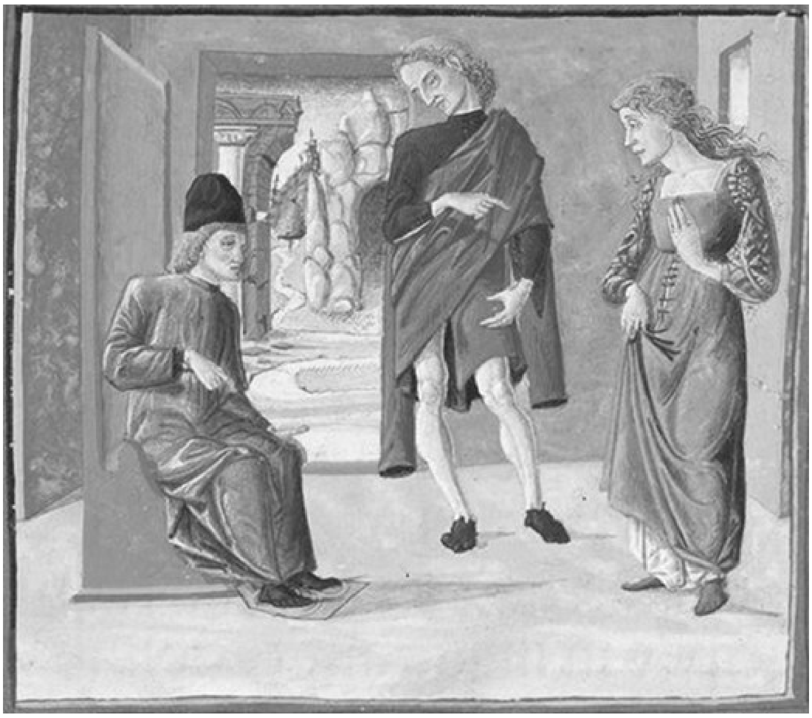
Figure 3.1



Building Certificate, Babylonia, 604–562 BC, Kunsthistorisches Museum, Wien.

(© KHM-Museumsverband.)

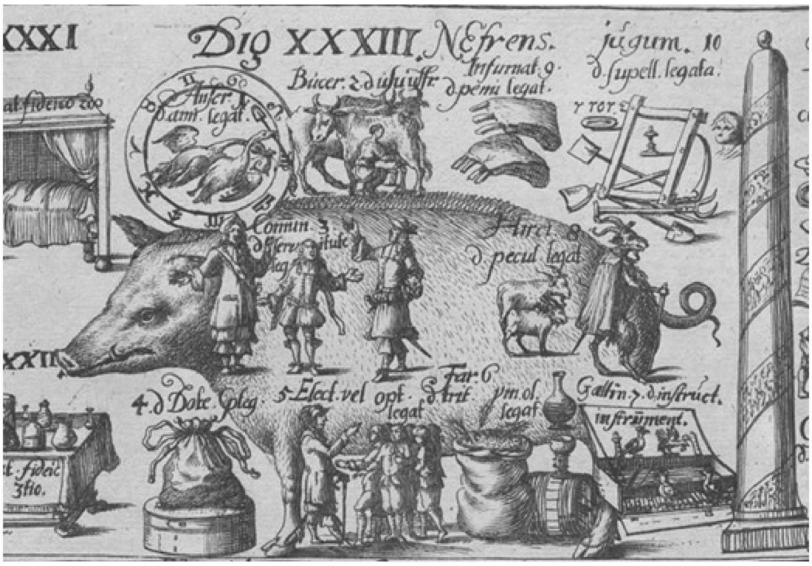
Figure 3.2



Scene of Marriage, Decretum Gratiani Roverella, 1474, Palazzo Schifanoia, Ferrara.

(© Réunion des Musée Nationales, Paris.)

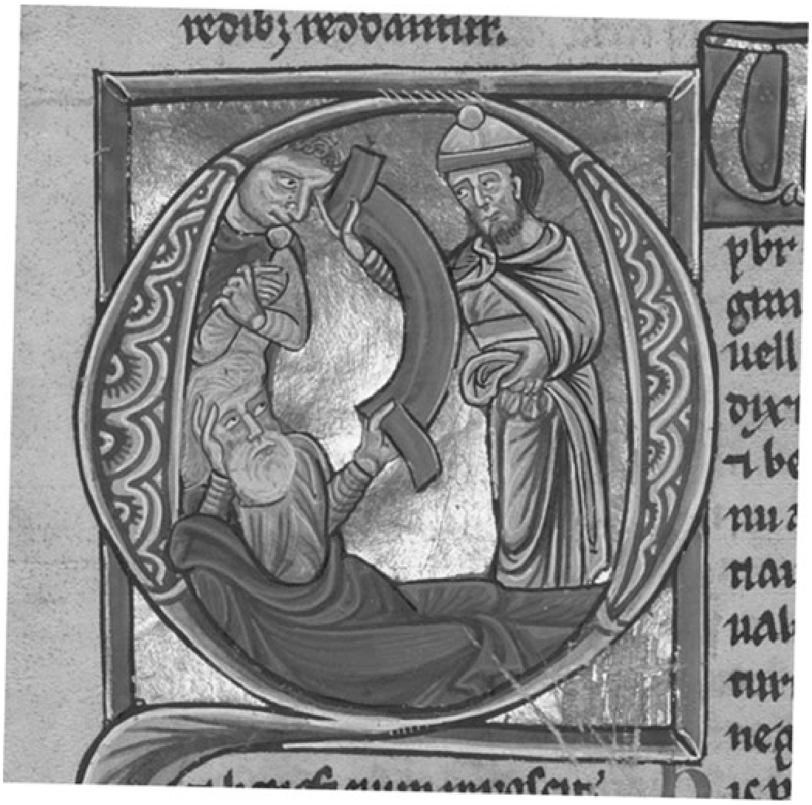
Figure 3.3


XXXI
Dig XXXIII
jugum. 10
d.supell.legata.
Infurnat.9.
d.penu legat.
Anser.
d.ann.legat.
Hirci 8
d.pecul.legat.
5.Elect.vel opt.
legat.
4.d Dote Cleg.
Gallin.7.d.instruct.
instrument.

Johannes Buno, Memoriale Iuris Civilis Romani, Hamburg 1673, dig. 31–33.

(© Bayerische Staatsbibliothek, München.)

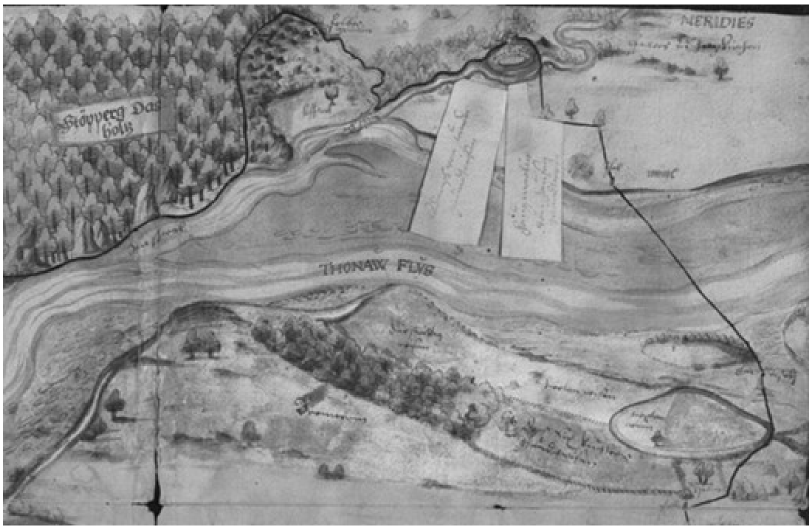
Figure 3.4



Initial with a man on his deathbed giving his testament to a notary, Decretum Gratiani, *c.* 1170–1180, fol. 140v.

(© The J. Paul Getty Museum, Los Angeles.)

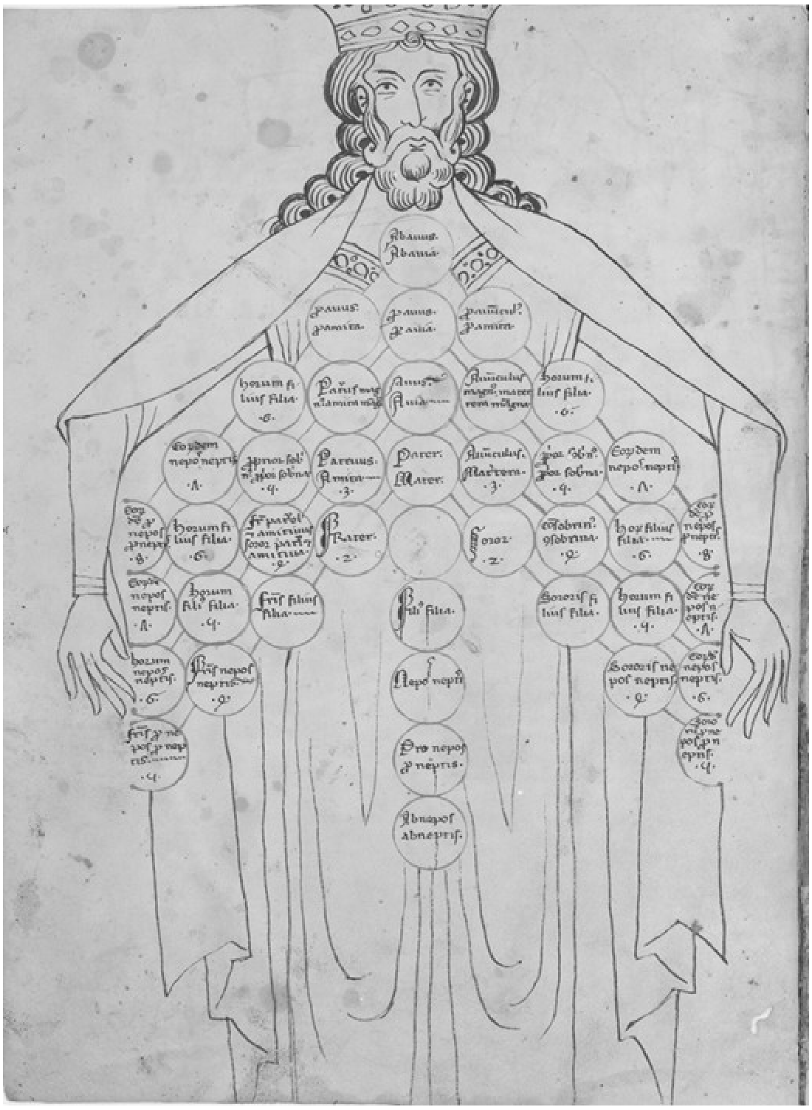
Figure 3.5


MERIDIES
Kröpperg Das holz
THONAW FLVS

Inspection map with boundary marks, used in trial, Bavaria, 16th century.

(© Universitätsarchiv München)

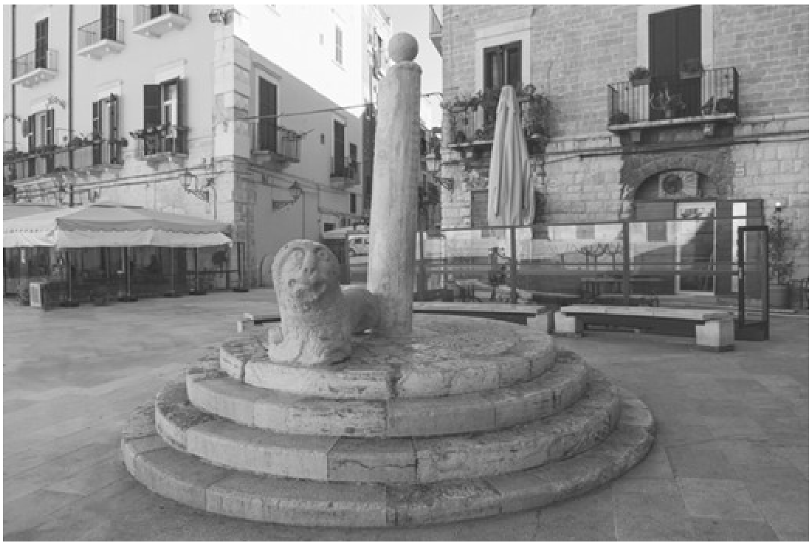
Figure 3.6


Abauus. Abauia.
Pater. Mater.
Patruus. Amita. ·3·
Auunculus. Matertera. ·3·
Frater. ·2·
Soror. ·2·
Filius filia.
Nepos neptis.
Pronepos proneptis.
Abnepos abneptis.

Arbor Consanguinitatis, Biblioteca Vaticana, Vat. lat. 1290, fol. 10.

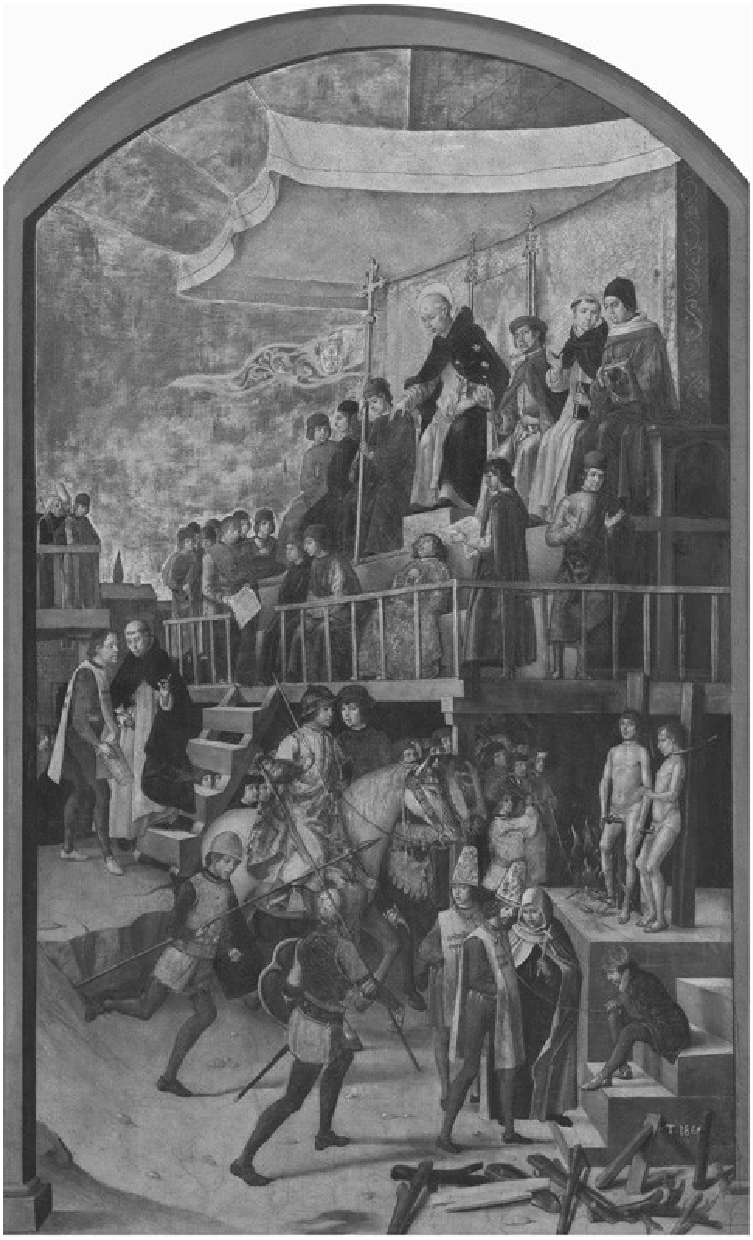
(© Biblioteca Apostolica Vaticana.)

Figure 3.7



Column of Infamy, with lion as “custos iusticiae.” (*c.* twelfth century, Bari ((c) Ennio Cusano))

Figure 3.8



Pedro Berruguete, Saint Dominic Guzmán presiding over an Auto da Fè, *c.* 1495, Museo del Prado, Madrid.

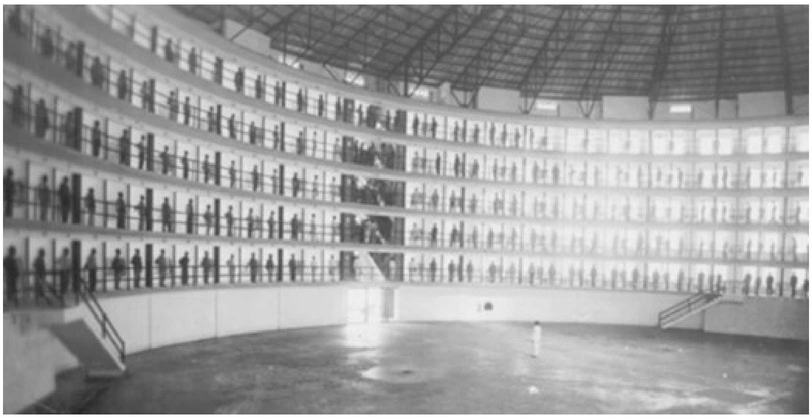
(© Museo del Prado, Madrid.)

3.3 History and the Archeology of Law

During the long nineteenth century, along with changes in media and communication technology, the modalities and meanings of the visual in and for the law shifted in both positivist and historical legal thought. The positivists based their notion of law on the analysis of universal legal concepts, which treated the law as the command of the sovereign, whereas the historical school stressed custom, religion, and opinion as sources of the law. ↳ Although diametrically opposed, both schools have influenced the concepts and models of legal studies, of how to grasp visual and sensual artefacts and media in law.

Jeremy Bentham’s utilitarian approach set the fundamental measure of laws and institutions as a principle, advocating the codification of common law into statutes. He defined the universal structure of disciplinary spaces of modernity through vision and visuality. Power is de-individualized, and modern society imbued p. 53 with a variety of ↳ forms of surveillance. As a social reformer, Bentham wanted to reshape legislative architecture into vehicles for "publicity." Through his architectural model of the Panopticon (1791) he stressed the disciplinary power of surveillance in prisons and other institutions like workhouses, schools, and factories. Constructed on a circular plan, the inspector kept the establishment under continuous surveillance (Figure 3.9). This architectural idea can be described as a design that, for Bentham, resulted first of all in "a new mode of obtaining power of mind in a quantity hitherto without example."[44] The panoptic was conceptualized by Michel Foucault as the power principle of *panopticism*, resulting in a "society of control" in which legal rules and norms are internalized through inducing a state of constant and permanent visibility.[45] Communication and information technologies have drawn upon this panopticon-principle, assuming that society is totally dominated by networks of electronic surveillance. It has radically altered views of technology and vision, which entailed the relation between the institutional and social organization of vision and social power (as discussed in Part 5.).

Figure 3.9



Panopticon prison "Presidio Modelo." (Cuba, *c.* 1940.)

The historical school of Friedrich Carl von Savigny (1779–1861) fathomed law behind the legal text as a system that is constantly moving through time and that is preserved within culture, a product of history and tradition.[46] Savigny coined the concept of legal science ("Rechtswissenschaft"), setting the frame through a system of four canons of legal interpretation: the grammatical, logical, historical, and systematic. With the understanding of law as the product of history and tradition, closely connected to language, the historical p. 54 school also emphasized the national character of law, rooted ↳ in popular traditions and customs.[47] Customary law was here conceived as a reflection of the character and needs of German society, based on ethos, heritage, and continuity. Savigny's school rejected any system of codified law and stressed the legacy of the intellectual "wealth of preceding generations" (Savigny). Together with Jacob Grimm (1785–1863) he anchored legal history in the folkloristic traditions of the German-speaking countries.[48] Their collection of "materials pertaining to the physical side of German legal history" (Grimm) concentrated on "legal antiquities" following the tradition of a *iurisprudentia picturata* and *iurisprudentia symbolica*.[49] The objects of investigation belonged to a broader cultural field of law, including legal norms, customs determined by law, instruments employed in legal life, and symbols with legal meaning. The sources derived from different fields such as archaeology, art history, philology, and numismatics. The "instruments" included devices of punishment and execution as well as buildings used for legal purposes, like city halls, courthouses, prisons, palaces, castles, and other seats of legal authority. Insignia, coats of arms, weights and measures, and also games, tales, and fairy tales formed part of the vast inventory of legal culture. Grimm's two-volume study *German Legal Antiquities* (*Deutsche Rechtsalterthümer*) refers to the antiquarian tradition while stressing the "sensuous element" in law.[50]

It was the legal historian Karl von Amira (1848–1930), an expert on Eike von Repgow's fourteenth-century *Mirror of the Saxons*, who coined the term "legal archeology."[51] Essential to his investigation was a description and catalogue of visual sources such as legal instruments, symbols, and symbolic actions (Figure 3.10).[52] Also encyclopedic in his approach, Amira sought unity of a visual legal culture via language and "folk tradition." This sensuous approach to legal history liased with growing nationalistic tendencies.
p. 55 Theories of a national peculiarity of the sense of justice were taken up by the ↳

p. 56 ↳

National-Socialists in their quest to guarantee ethnic and racial homogeneity.[53] Similarly, Hans Fehr (1874–1961), whose book *Law in Pictures* (1923) is still often cited, had a nationalistic approach to legal history, investing research in the sensuous, visible, and material part of judicial life and action.[54] More than his predecessors, he focused on artworks, pictures, and objects, aiming to "overcome the unilateral intellectual activity of the jurist." He attempts to consider all kinds of artworks to explore the relationship between art and law, while fostering the anti-rationalistic notion of a "dynamic jurisprudence" that would emanate directly from life and not from legal definitions. Apart from his own attempt to differentiate between "types" of images (as, for example, images with text, decorative images, and artistic images), he assumes in his introduction that art can "render a service to law" because it can shape, teach, and lead to cognition and finally to legal normativity itself. He combined (sometimes rather erroneously) both the archaeological method of a broader survey describing the object and its function and what seems closer to art historical methods of iconographical analysis. Interestingly, in general works on visual studies in law, the work of Fehr is often cited as exhibiting extensive research on legal imagery but is less often presented as ideologically laden because of its search for a "lost unity" of law, religion, art, and language.[55]

Figure 3.10

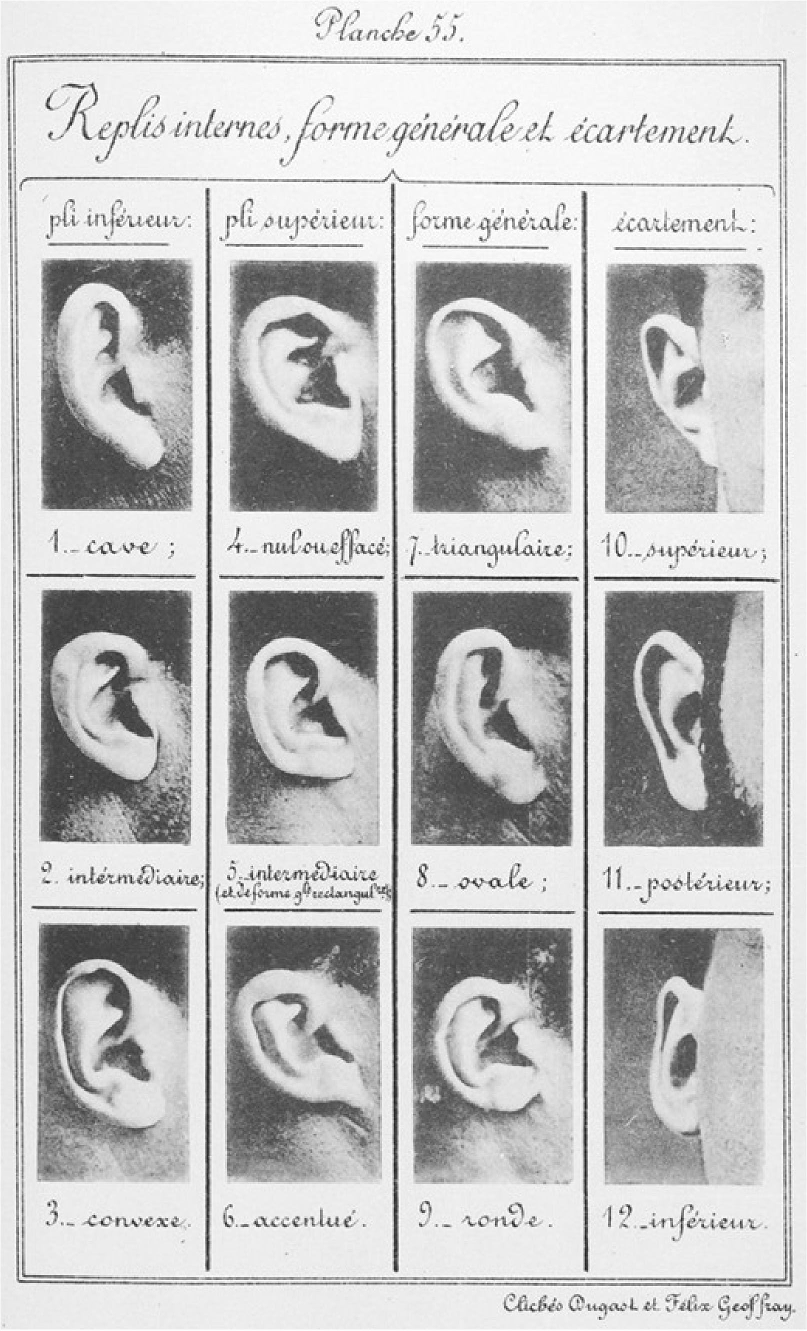


Planche 55.
Replis internes, forme générale et écartement.
pli inférieur:
pli supérieur:
forme générale:
écartement:
1.- cave ;
4.- nul ou effacé;
7.- triangulaire;
10.- supérieur;
2. intermédiaire;
5.- intermédiaire
(et de forme gle rectangulre)
8.- ovale ;
11.- postérieur;
3.- convexe.
6.- accentué.
9.- ronde.
12.- inférieur.
Clichés Dugast et Félix Geoffray.

Alfonse Bertillon, Identification Anthropométrique, 1893.

(© Wellcome Images.)

The interest in legal archaeology, with reference to its founder Karl von Amira, persists up to the present but has critically questioned his nationalist and ideological impulses.[56] Legal archaeology and its methodological models such as iconography, material culture, and folklore studies have been “updated” to serve also as a tool in visualization strategies of legal norms.[57]

3.4 Symbols, Signs and Iconology

Art history, understood as image science (“Bildwissenschaft”), has included art as well as non-art in its frame of research since the early twentieth century. Visuality referred to the “constitutive symbolic renderings in the making of ‘experience.’ ”[58] Symbolic forms ↳ were conceived as representations of p. 57 human creativity. Iconology assumes that this mundane experience of seeing or imaging is tied to symbolic values of different historical contexts.[59] It has been advanced methodologically in the works of intellectuals affiliated with Aby Warburg’s “Kulturwissenschaftliche Bibliothek” in Hamburg, such as Ernst Cassirer, Erwin Panofsky, and Edgar Wind, who developed the iconological method systematically through the study of Renaissance art. Through their forced exile during the Nationalist Socialist regime, their notion of culture and symbols (and the broader concept of the image which they discussed and formulated) was scattered and disseminated.[60] Cassirer’s theory of symbols, which could be described as the philosophical core of their science of culture, defined the law as a product of the formative or symbolic that is interconnected with myth.[61] In his attempt to describe how sensible objects convey meaning, he insists on the non-dualistic imbrication of meaning and the sensuous.[62]

During his exile in Sweden, Cassirer encountered the legal realist philosopher Axel Hägerström, who saw myth and law as interconnected; consequently, Cassirer began to grapple with the idea of myths as hidden layers and “magical” representations of law’s mythico-religious subsoil. Without denying the importance of myth and religion for the law, Cassirer argued against the view that this old “subsoil” was consequently transformed and reshaped.[63] In his view, all concepts of law directed themselves toward social experiences, moving from the mythical to the symbolical. Law possessed a typical function of objectification, just like language, leading to objective notions, while distancing itself from immediate sense impressions.

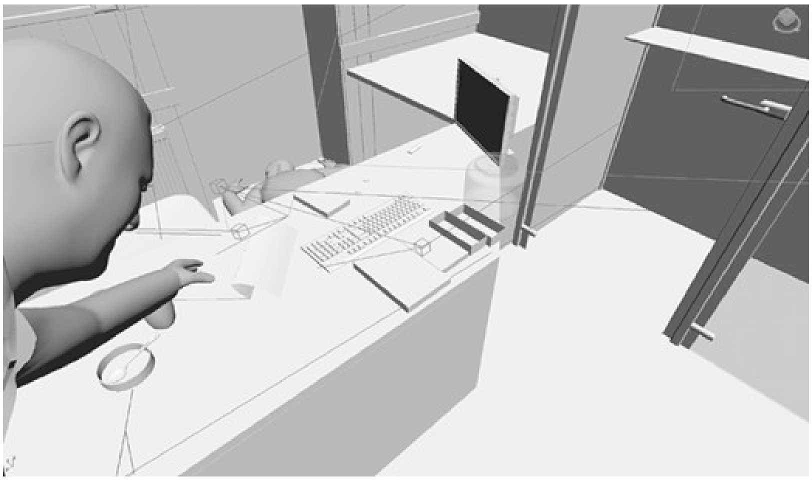
Cassirer’s notion of the symbolical shared, with Warburg’s concept of culture, a common ground in the theory of expression, mythical thought, and resemblance.[64] Unlike art historical notions, which asked how single artists conceived the world, Cassirer’s concept of symbolic forms examined the common formative processes that transcend time and place.[65] Central to Warburg’s concept of “iconology” is the pursuit of a diachronic line concerned with the “afterlife of images” (*Nachleben der Bilder*) since antiquity. It is not a p. 58 structured synchronic narrative, as in other cultural histories, but ↳ involves dissemination and recomposition of images and forms across time and space (Figure 3.11).[66] Warburg emphasized, moreover, the unconscious charges that this migration of images facilitates.[67] This posed the problem of both conscious selection and cultural *translatio* of forms, as well as the unconscious inscription of tradition through coded visual signs.[68] Thus, in visual images not only are different types of motifs to be identified, by attributing particular meanings to them, but moreover artefacts and objects are treated as sources with evidential value for the interpretation of political, cultural, and social contexts. Later, Panofsky went further in defining a “visual logic” principle of manifestation, according to which the principle of spatialization in the architectural hierarchical order of a Gothic cathedral and the discursive order of the literary *manifestatio* would be conceived as homologous.[69] Michel Foucault has underlined the most striking aspects of this method:

p. 59

> Panofsky removes the privilege of discourse. Not in order to claim the autonomy of the plastic universe, but in order to describe the complexity of their interrelations: entwinement, isomorphism, transformation, translation, in short, this entire “feston” of visible and speakable that characterizes a culture in a moment of its history.[70]

Warburg’s notion of iconology understood material images in the broader sense of “Bild,” meaning image and picture as well as the visual and every consciously created figurative form, from medieval textiles to the illustrated press of the early twentieth century. They are conceived as sources for learning about mental images of the past. Other historians of this Hamburgian intellectual ambit, such as Percy Ernst Schramm and Ernst Kantorowicz, explored medieval sovereignty and representation through legal sources.[71] Schramm's methodological approach to the medieval signs (*Sinnzeichen*) of political power was connected to the legal historical tradition of Grimm and Amira; thus this approach stood in contrast to Cassirer and Warburg's notion and theory of symbols.[72] Schramm stressed the idea of "legal signs" that evoked specifically legal relationships, covering different objects and artefacts such as thrones, heraldry, gestures and relics, and things closely connected to the king's body like crowns, swords, rings, and orbs, which were "visible signs of his invisible office."[73]

Figure 3.11



Design: computer simulation and motion tracking of Andreas Temme's line of vision in the Internet cafe.

(© Forensic Architecture, 2017.)

Warburg's historiography of art was for a long time forgotten after the end of the war. Through his iconological studies of political images, Martin Warnke and other scholars revived Warburg's method scrutinizing the stereotypes of political imagery in the 1990s.[74] Warnke coined the term "political iconography" and based his work on a large collection of image cards, with numerous connections between key terms and images in the field of law and justice.[75]

Art and cultural history following Warburg's ideas have influenced the analysis of legal imagery in various ways. In his study *The Power of Images* (1989), David Freedberg takes several examples from the field of law to explain the consequences and variations of emotional responses to images that are believed to exercise visual and affective force.[76] ↳ Interested in the idea of an *energeia* inherent in images, which until the Enlightenment was identified as a naturally occurring force, Horst Bredekamp also followed the intellectual thread of the Warburg tradition in his approach to visual agency. He coined the term "substitutive image act," which thematized various aspects of the juridical character of images. Signatures on artworks that bear "witness to the self" and the personhood of the picture "motivate symbols of sovereignty" that not only statically represent but act upon subjects, and "legally codified pictorial punishments" or phenomena of iconoclasms are evidence for "image acts." Recognizing the active aspect of artworks, which through their own potency actively form perception and experience, Bredekamp concludes: "Images can be placed neither before nor behind reality, because they work to constitute reality. They are not reality's consequences, but rather a form of its determination."[77] Sense, and especially seeing, is hence understood as a kind of reason that has cognitive power. As Erwin Panofsky had already argued in his influential text on gothic architecture in the scholastic period, the domain of visuality was intellectually charged. Artefacts that formed the visibly perceivable world would bear a visual logic that made abstract principles manifest.[78]

Panofsky’s concept of iconology, developed as approaching the “intrinsic meaning” or “underlying principles which reveal the basic attitude of a nation, a period, a class, a religious or philosophical persuasion,” has strong affinities with the semiotic philosophy of Charles S. Peirce.[79] Describing the connections between Peirce and legal realism, Roberta Kevelson has emphasized that Peirce, who was influenced by Bentham’s notion of the link between observation and ideation, established a “theoretical foundation for a new approach to understanding the interrelations of law, economics, and politics against referent systems of value.”[80] Peirce understood interpersonal transactions against the theoretical background of a “dynamic motion picture universe” that is in continual flux and becoming, “infinitely developing and changing in response to genuinely novel elements that emerge as existents.” It is through this movement that the basic concepts of rights, resources, and reality would “take on new dimensions of meaning.” This Peircean dynamic approach to semiotic analysis of sign systems is characterized by the “the ideational stuff of which images are made for new ideas” and their “potentiality for expanding boundaries and for stretching the limits of space, of temporality.”[81] Legal aesthetics understood as the “investigation of p. 61 normative value” thus fathoms the history ↳ of law as an “imagistic sign of social principles” that describes the function of law in relation to social values as “reflection or mirror-image; sometimes as refracture, i.e., as a cubistic or kaleidoscopic transformational kind of representation.”[82] Emphasizing the contingency and fluidity of legal concepts, the approach of legal semiotics has tried to conceive the notion of visual images as part of swiftly developing cultures of simulacra, which have shifted away from the verisimilitude that once was the basis of representation and legitimacy.

3.5 Optical Media and Sensorium

Art and cultural history approached law’s diverse relations to visual phenomena through the symbolic, expressive, and representational in historical, political, and scientific contexts. Instead, historical media studies that emerged in the 1980s have described the absorbing and multisensorial dimensions of media in a different frame of reference for traditional objects of the humanities, and shifted the interests from the identification of meaning to “all those phenomena and conditions that contribute to the production of meaning, without being meaning themselves.”[83] Media studies became interested in different media and knowledge technologies that were previously ignored, such as “index cards, writing tools, typewriters, discourse operators (such as quotation marks), pedagogical media such as the blackboard, media-like phonographs or stereo sound technology, and disciplining techniques like alphabetization.”[84] In his critique of Marshall McLuhan, Friedrich Kittler doubted that media technologies are extensions of human beings that amplify or extend the senses; instead they would “strategically override them.” Optical-technological media such as film therefore stand at the beginning of a development that ends with digital and computational techniques framing the sensuous realm; as Kittler states: “we knew nothing of our senses until media provided models and metaphors.”[85]

Following this media-historical approach, Cornelia Vismann has shown how legal practice fostered discourse networks that functioned through different media technologies, such as protocols and files that record, store, and transmit legal data and control the formalization and differentiation of the law in p. 62 general.[86] Understanding the use ↳ and practice of media, such as the use of photography in the courtroom, the cinematic-dispositif, television tribunals, and broadcast out of the courtroom, has fundamentally changed the notion of legal action. Technical media that make use of physical processes faster than human perception have altered the notion of visual truth in law. Since the nineteenth century, photography as a legal tool of documentation has fundamentally changed the evidentiary status of images and forensic techniques. Photographs such as mugshots and crime scenes stored in forensic archives were described as the “archetypal form of documentary photography” that would stand in opposition to any other images in art.[87] These normative productions of images and their indexicality in forensic and legal terms have coined the medium as a dominant means for constructing, understanding, and testing reality.[88]

One of the main results of photography’s ability to display reality has been the redefinition of the connection between information and truth. Susan Sontag described it as the emergence of bureaucratic cataloguing. Institutions of control, such as the police, are able to survey and control “increasingly mobile populations” through photographic documents kept in forensic archives, and also through passports or identity cards.[89] The metaphor of photography as an “artificial eye” suggests that visibility continues in the photographic medium, like an effortless transition from sensory to technical “vision.” However, considering the contingency of optical media that develop a dynamic of their own helps to recognize their fundamental “impact on our senses and organs.”[90] Today, the analysis of film, digital technologies, and mass media has helped to understand how visual communication that is related to the sensual world increasingly generates legal meaning non-verbally.[91] However, the question of how the legal system, as a major producer of cultural meaning, has absorbed and internalized the simulacra conditions, which not only produced a flood of data but also shifted to different patterns of consumption, still needs to be described in more detail.[92] The visual culture of a computer age is “cinematographic in its appearance, digital on the level of its material, and computational (i.e. software driven) in its logic.”[93] Despite this radical transformation of media technologies, there seems to exist an aesthetic continuation of the modernist avant-garde and a register of the computerization of contemporary culture. Aesthetic strategies p. 63 are “embedded in the commands and interface metaphors of computer software”[94] and ↳ their active role in producing normativity has become extremely complex but needs to be described in its impact on legal procedure and administration.[95]

Understanding the law through the visual sphere has become by now a multifaceted endeavor with similar approaches and hypothetical assumptions just as in the humanities and sciences. This perspective has also led to, or accompanied, a broader tendency of explaining the multisensorial dimensions of law, as legal techniques seek to control and discipline the human experience of the senses.[96] After an “era of linguistic analysis preoccupied with cultural codes,” several recent undertakings have sought to start from scratch in exploring and determining the intractable “force fields of the body and of the artefact.”[97] The “sensorium” in general is discussed as a tool that exercises power and also counters regulatory forces: “The senses operate as a vector for the implication of subjects in legal webs, but also as a powerful site of resistance to legal definition and determination.”[98] These undertakings have left behind the dichotomies of mind/body, subject/object, and humanity/nature, toward a theory of presence, aiming at abandoning the concept of representation.[99] Considering the presence of all those “visual apparatuses” that influence modes of legal reasoning, “visual literacy” has become an essential competence for legal practice and judgmental processes, which should be considered intrinsically tied to its historical dimension.

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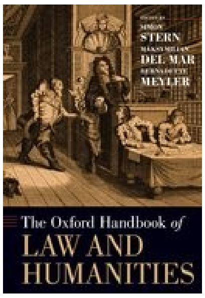

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CHAPTER

4 Book History

Henrike Manuwald

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Abstract

Book history, understood broadly as the analysis of written communication, interacts with legal studies in two main areas: first, legal rules frame the production and dissemination of books or written documents (in many cultures); second, books and written documents can act as meaningful objects within the legal sphere. This chapter focuses on the second area and shows by way of examples how taking the materiality of the book as a starting point can help to uncover cultural structures linked to the law. The chapter demonstrates the potential of this approach by focusing on a period in which books with legal contents radically changed their function: the Middle Ages in Europe, with their shift from writing down customs in the vernacular as a means of preservation to actual law books used as works of reference. As can be shown, the design of legal manuscripts played an important role in this process of codification. But not only law books are elements of the legal sphere: the chapter also outlines the function of books in legal rituals with religious implications as well as the merging of "law" and "literature" in some medieval manuscripts. Finally, the chapter draws attention to the opportunities book history offers for research into intercultural relations and into the change of legal culture in the digital age.

Keywords: materiality of texts, layout, illuminated legal manuscripts, legal rituals or performance, media history, manuscript/printing culture, law and literature, codification, copyright, intercultural exchange

Subject: Jurisprudence and Philosophy of Law, Law and Society, History of Law, Law

Series: Oxford Handbooks

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4.1 Introduction

IN regard to the organization of communities, the question of whether legal norms are preserved in oral or in written form is of crucial importance.[1] The nature of the transmission also determines how members of the community perceive the law: either as principles embodied by trustworthy persons or as an abstract norm issued by authorities, to name just the opposite ends of the scale. But it is not only the medium in the sense of voice or script that adds semantic features to the law; it is also the supporting medium, as the example of the *Code of Hammurabi* shows: while the function of this Babylonian legal text continues to be a matter of dispute,[2] there is no doubt that, in terms of propaganda, its preserved presentation on a basalt stele, including a figure of the king being authorized by a god, will have had an effect different from its equally attested presentation on clay tablets. A quite recent debate in the UK parliament on the use of parchment for archiving laws indicates that the character of the supporting medium (in this case its durability) plays a role, but also that there is more to it: the use of parchment for archiving in the twenty-first century is a traditionalist statement, and the practice was promoted as such.[3] Thus, the choice of medium can reveal a great deal about the values attributed to the law. Likewise, law books or books on law
p. 66 cannot be reduced to the ↳ words they transmit. In addition to the supporting material, the page layout and even the form of the letters convey meaning.[4] By studying books in the legal sphere "as an expressive form,"[5] book history can help to uncover broader cultural structures that are linked to the law, but also go beyond it.

This chapter outlines what kind of questions book history asks with respect to the law and how the study of books can enrich our understanding of law as an element of culture. While such an approach is not restricted to any particular culture or period, the chapter demonstrates the potential of this perspective by focusing on a period in which books with legal contents radically changed their function: The Middle Ages in Europe saw a shift from writing down customs in the vernacular as a means of preservation to books of statutes used as works of reference. Therefore, it is worth looking at the role of books for the law in this period, in which public oral rituals also played an important role. The material from this epoch can serve as a starting point for developing systematic questions. Since book history is by no means a uniform discipline, the scope of the approach has to be discussed first.

4.2 Book History and Its Relation to Legal Studies

In 1998, the Society for the History of Authorship, Reading, and Publishing (SHARP) founded in 1991–1992, established the journal *Book History*.[6] The editors outline a broad concept of book history, defining its subject as "the entire history of written communication: the creation, dissemination, and uses of script and print in any medium, including books, newspapers, periodicals, manuscripts, and ephemera. We will explore the social, cultural, and economic history of authorship, publishing, printing, the book arts, copyright, censorship, bookselling and distribution, libraries, literacy, literary criticism, reading habits, and reader responses."[7] Frequently, however, the field is defined far more narrowly as "print culture," which is sometimes also used as a synonym for book history as an approach.[8] The divergences in the concept of "book history" arise because book history is not the name of a long-established discipline but rather an umbrella term for a multidisciplinary approach to written communication, drawing together (descriptive)
p. 67 bibliography, literary studies, and media studies, as well as ↳ economic and social history.[9] It can therefore also be applied to research on printed books or, more generally, on written communication, which was and is being done in these single disciplines. Still, the founders of SHARP saw this society as a means to consolidate a new discipline,[10] and this discipline has now been institutionalized in various countries.

While the status of book history as a discipline is not a matter of interest in this chapter, it is important to note that book history does not provide a methodology by itself but draws on a number of methods ranging from hermeneutics to statistics (e.g., for the analysis of the book trade).[11] Thus, for example, book history can overlap with discussions on textuality in literary studies or theories of scholarly editing: For the shape of book history, D. F. McKenzie's concept of the sociology of texts has been very influential in highlighting both the sociological context of written texts and the semantics of their materiality. Both aspects have been stressed with respect to manuscripts in medieval studies in the debate on the (controversial) approach of "material philology."[12] The concept of the "material text" has been further developed by Peter Shillingsburg[13] and is being discussed within the framework of textual theory related to the field of digital editions.[14] These overlaps show that there are systematic questions related to the materiality of written communication which are not restricted to printed books. The same is true for the role of readers, a question that has recently received increasing attention in book history.[15] Therefore, a broad concept of book history as put forward by the editors of the journal *Book History* makes sense.

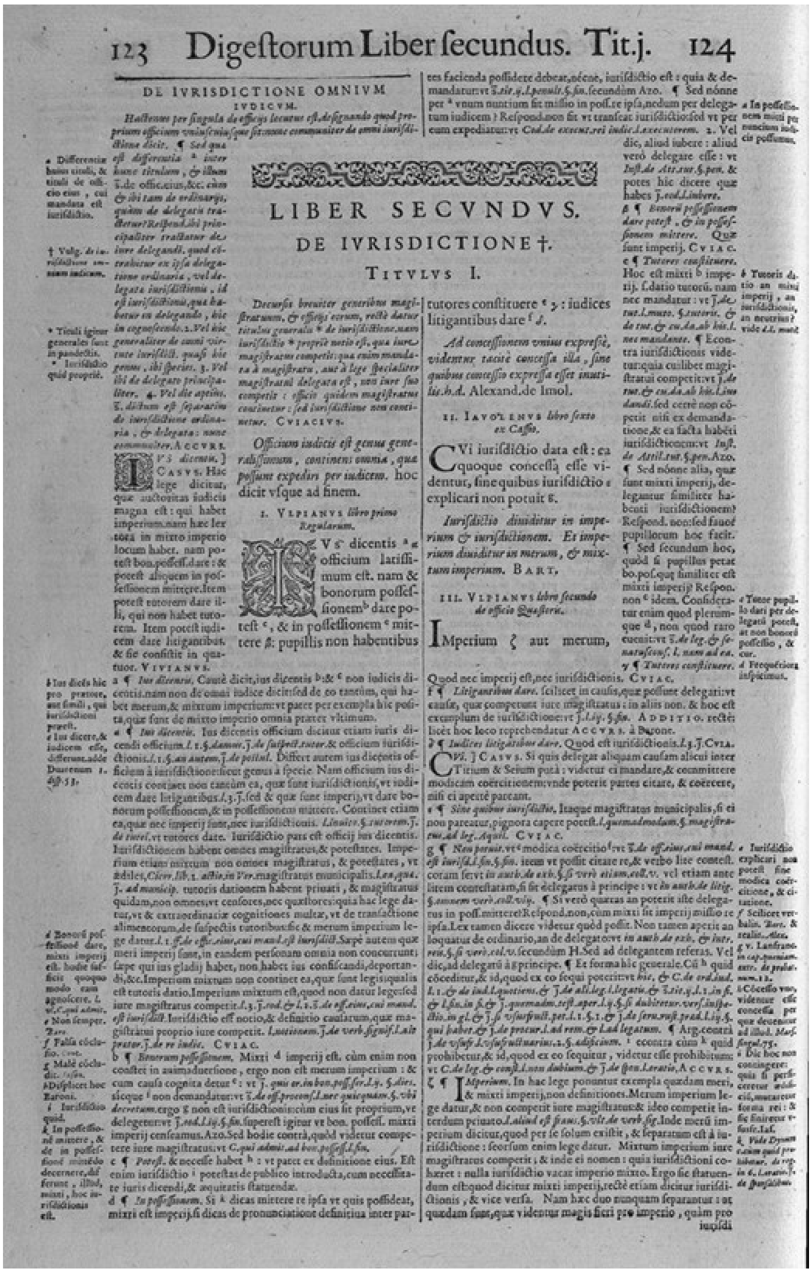
In what follows book history will be regarded as an element of media history yet restricted to written communication. This, however, is only one perspective on the field.[16] In addition to the variance caused by its interdisciplinarity, national and even local traditions have led to a great diversity.[17] In France, for
p. 68 example, the *annales* school ↳ of methodology has been influential in placing book history in the broader context of cultural history.[18] While cultural studies and media studies are sometimes seen as two different strands of the field,[19] media history is here understood as part of cultural history, which corresponds to recent tendencies to link cultural and media studies.[20]

Regardless of the multifaceted nature of book history, two main areas can be identified where book history and legal studies interact. The first is the production and dissemination of books or written documents. At least since the spread of printing (in Western culture) these processes have been framed by legal rules, including censorship and copyright laws.[21] Research on the latter also sheds light on the concept of intellectual property.[22] The second area (highlighted in this chapter) is law as an element of written communication. This interrelation has been studied from different perspectives: McKenzie, for example, used a treaty (the Treaty of Waitangi, 1840) to investigate the clash between oral and script cultures.[23] Chapters on books in the legal sphere have been incorporated into the seminal *Cambridge History of the Book in Britain* (1999–2009), covering a period from *c.* 400 to 1914 and including aspects of manuscript studies, print studies, the book trade, and the history of science. These two examples indicate that "law" is seen as an integral part of book history as a field, though it is rarely as explicitly put as in António Manuel Hespanha's "Form and Content in Early Modern Legal Books," which addresses the relation between studying the materiality of books and legal thought already in its subtitle.[24] A great deal of research on books and the law is not labeled book history at all, which can only be roughly outlined here, with the Western Middle Ages, especially the German-speaking areas, as an example: the textual history of legal texts, including finding aids within books, has been the subject of legal history,[25] where the production, dissemination, and reception of books has received increasing attention, also from an intercultural
p. 69 perspective.[26] The transition from oral to written ↳ law and the role of law books in public rituals have been the subject of historical research.[27] Legal manuscripts have been studied from a codicological and art-historical perspective[28]; the art-historical perspective has now also been extended to charters.[29] Art history in this context refers not only to stylistic analysis, which can be a means to determine the spread of knowledge, but also to studies on the use of images, so that it is closely connected to (legal) history and media studies.[30] Literary studies have also contributed to the interdisciplinary research on legal manuscripts and printed books.[31] A similar scope could be shown for other periods. In addition, more comprehensive studies on how the use of legal documents shapes legal thought have come from anthropology[32] and, recently, legal theory.[33] Book history in the legal sphere thus is deeply intertwined with other approaches such as material history.[34]

4.3 Legal literature? The Function of Books in Legal Rituals

Legal literature may have multiple forms: written laws or formal statements about certain rights (e.g., in charters) form only a portion of legal writing. There are also commentaries, practice manuals, formularies, case reports, written verdicts, treatises, p. 70 ↳ textbooks for the study of law, and so on (see Part IV, Legal Genres).[35] The list could be extended, especially because the boundaries of the corpus are blurred: does a narrative about a case or a legal theme also count as a legal text in a broader sense, or not? The shapes of material texts are as varied as their genres—ranging, for example, from prestigious volumes with statutes to less valuable books for private study, but not all differences can be related to textual genres. Besides, a single text can be presented in various ways. Studying the materiality of the objects can therefore help to determine the status ascribed to the texts and their usage. If statutes are surrounded by different layers of commentary on a page, the layout will indicate the hierarchy of these texts (Figure 4.1).[36] Traces of wear and tear or handwritten notes can show that a text has been studied. Such signs are particularly valuable if the function of a legal text is subject to change: the *Saxon Mirror*, which started out as a "private" collection of common law in the second quarter of the thirteenth century, was later given the design of a law code (see below). Further, attempts to keep the text of the *Saxon Mirror* up to date and compilations with other legal texts in some manuscripts indicate that these manuscripts were meant to have a practical value for legal transactions, while the combination of outdated textual versions with texts from other fields (e.g., astronomy) rather points to legal interests by non-specialists.[37]

Figure 4.1



123 Digeſtorum Liber ſecundus. Tit. j. 124

LIBER SECVNDVS.

DE IVRISDICTIONE †.

TITVLVS I.

*Decurſis breuiter generibus magiſtratuum, & officijs eorum, rectè datur titulus generalis * de iuriſdictione. nam iuriſdictio * propriè notio eſt, quæ iure magiſtratus competit: quæ enim mandata à magiſtratu, aut à lege ſpecialiter magiſtratui delegata eſt, non iure ſuo competit: officio quidem magiſtratus continetur: ſed iuriſdictione non continetur.* CVIACIVS.

Officium iudicis eſt genus generaliſſimum, continens omnia, quæ poſſunt expediri per iudicem. hoc dicit vſque ad finem.

I. VLPIANVS *libro primo Regularum.*

IVS dicentis [a] α officium latiſſimum eſt. nam & bonorum poſſeſſionem[b] dare poteſt [c], & in poſſeſſionem [e] mittere β: pupillis non habentibus tutores conſtituere [e] γ: iudices litigantibus dare [f] δ.

Ad conceſſionem vnius expreſſè, videntur tacitè conceſſa illa, ſine quibus conceſſio expreſſa eſſet inutilis. h.d. Alexand. de Imol.

II. IAVOLENVS *libro ſexto ex Caſſio.*

CVi iuriſdictio data eſt: ea quoque conceſſa eſſe videntur, ſine quibus iuriſdictio ε explicari non potuit [g].

Iuriſdictio diuiditur in imperium & iuriſdictionem. Et imperium diuiditur in merum, & mixtum imperium. BART.

III. VLPIANVS *libro ſecundo de officio Quæſtoris.*

IMperium ζ aut merum,

Code of Justinian, printed in Lyon in 1627, with the *Glossa ordinaria* by Accursius supplemented by further notes.

(Heidelberg, Universitätsbibliothek, I 696 Folio RES: 1, fol. 123r; © Universitätsbibliothek Heidelberg, http://digi.ub.uni-heidelberg.de/diglit/justinian1627bd1/0127 (CC BY-SA 3.0 DE).)

In the (Western) Middle Ages and the early modern period most of the legal literature seems to have been employed outside formal legal proceedings; thus, analyzing the contexts of its use is a means of determining the role of law in the respective societies. If one does not take legal literature as defined by its contents as a starting point, but rather turns one’s attention to legal rituals, there emerges a group of books that has not yet been thoroughly discussed in the context of book history: the books used in rituals of swearing a promissory oath.[38] Late antique sources indicate that despite a general Christian skepticism against swearing, in the second half of the fourth century taking an oath on an evangeliary began to be established (besides other forms of oaths).[39] In the fifth century, ↳ p. 71

p. 72 ↳

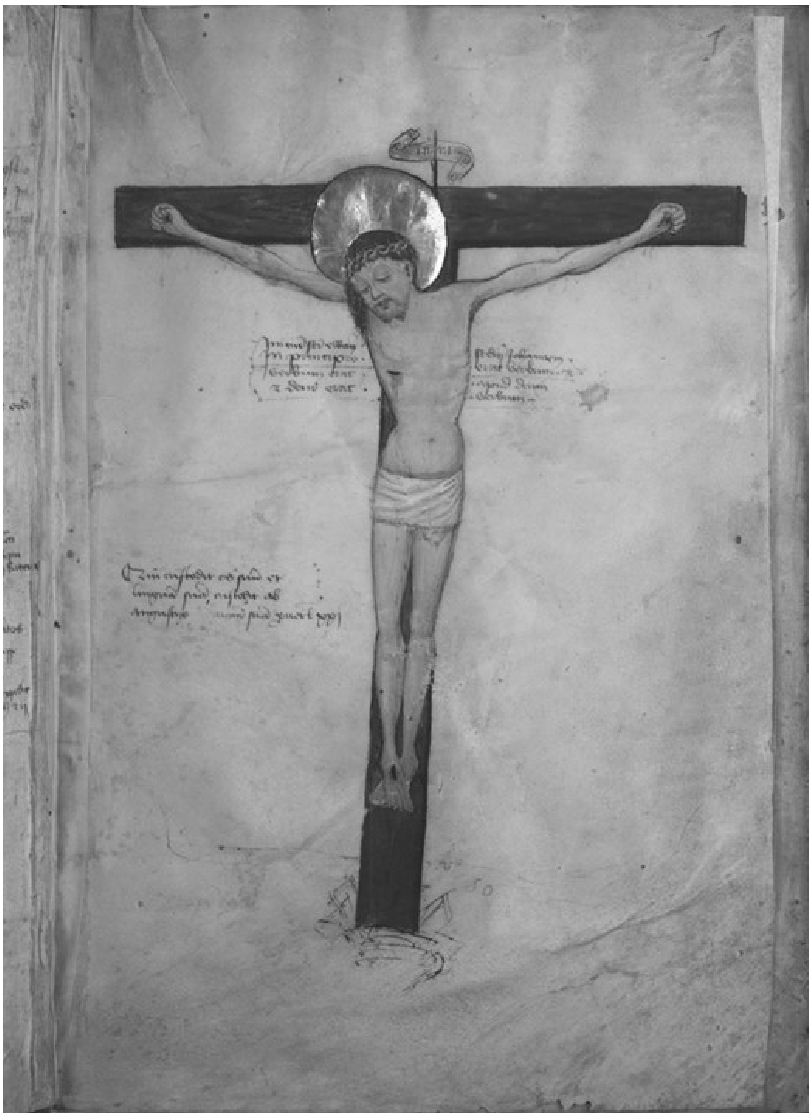
the *Code of Justinian* requests the use of an evangeliary for taking an oath or making formal declarations. This demand agrees with Justinian's later provision (531 CE) to have the Holy Scripture in court, so that judges would respect the presence of God. This rule corresponds to the treatment, in liturgical contexts, of the evangeliary as a representation of the *corpus Christi*.[40] In the context of taking an oath, the evangeliary assumes a legal character in the sense that it embodies the divine as the ultimate foundation of law and a guarantee of justice. The tradition of taking an oath on the evangeliary shows that, for that period, the legal sphere cannot be separated from the religious sphere.[41]

The role of the book as a physical object in oath-taking rituals can be deduced from guidelines published both by the state (*Golden Bull* of 1356) and, for ceremonies framed by canon law, by the church (*Pontificale Romanum* of 1520). According to these guidelines, which probably draw on already established practices, the oath should be taken on the open book in a position that would allow the person taking an oath to read the script (*Pontificale Romanum*). The evangeliary should be opened at the beginning of the Gospel of John (*Golden Bull*). There is also material evidence for the special role of the Gospel of John for taking an oath: in an Ottonian evangeliary from Mainz (made in about 1000), for example, pages with oath formulas for the clergy of the local church were inserted in the fifteenth or sixteenth centuries, supplemented by a separate leaf containing the beginning of the Gospel of John.[42] The tradition of taking an oath on the evangeliary influenced the shape of both evangeliaries and law books. The *Vienna Coronation Gospels* is the most famous example of a book whose representative function was underlined by a prestigious cover.[43] In Spanish collections of privileges, which assumed the quality of statutes, extracts from the gospels were integrated. Sometimes the beginnings of the gospels were combined with a depiction of the crucifixion, which then served as the page to be touched by the person taking the oath. The fact that the drawing and the script have been partly rubbed off in some extant examples documents their intense use.[44] Signs of wear are also displayed by pages with depictions of the crucifixion in so-called oath books from Cologne used by the city (Figure 4.2), the university, and the guilds as well as by prayer brotherhoods to make their "members"
p. 73 abide by the statutes of the respective body.[45] Although the oath-taking rituals cannot be ↳

p. 74 ↳

completely reconstructed, the material evidence in the books enables an insight into public legal performances.[46]

Figure 4.2



Worn crucifixion page used for swearing, from the third “oath book” of the city of Cologne, *c*. 1450.

(Cologne, Historisches Archiv, 30/V, V 10, fol. 1r; © Historisches Archiv der Stadt Köln (HAStK). Reprinted by permission.)

Such performances are not restricted to the Middle Ages. When the president of the United States takes a public oath during the inauguration ceremony, it is a political statement whether or not a book is used for taking the oath and which one is selected. Since George Washington (1789) most presidents have taken their oaths on an opened Bible; the choice of a Bible verse serves as a motto for the presidency. It was in all probability Washington who added the formula “So help me God,” which has been kept as an element of the oath ever since. Thereby he gave a religious frame to an oath focused on the Constitution.[47] Whereas Washington and most of his successors thus emphasized God as the warrantor who forces the president to abide by the Constitution, John Quincy Adams (1825) stressed the secular dimension by using, as he said in his diary, “a volume of the laws” in the ceremony, probably to read the oath of office.[48] From the perspective of book history it is noteworthy that the book as a physical object can be invested with further meaning by its provenance[49]: for his first oath of office as president in 2009 Barack Obama used the same Bible that Abraham Lincoln had used, for his second oath in 2013 Obama even used two Bibles, again the Lincoln Bible and additionally that of Martin Luther King (in both cases the Bibles were closed). Here the history of the individual volumes seems to override the reference to their contents because a mere doubling of the wording does not enrich the semantics. The example of the Muslim Congressman Keith Ellison shows that the symbolic quality of a book can, in fact, dominate a legal ritual: for his private swearing-in on January 4, 2007, he used Thomas Jefferson's Quran, thus highlighting a US tradition of religious freedom and mutual learning against his critics who demanded the use of a Bible.[50]

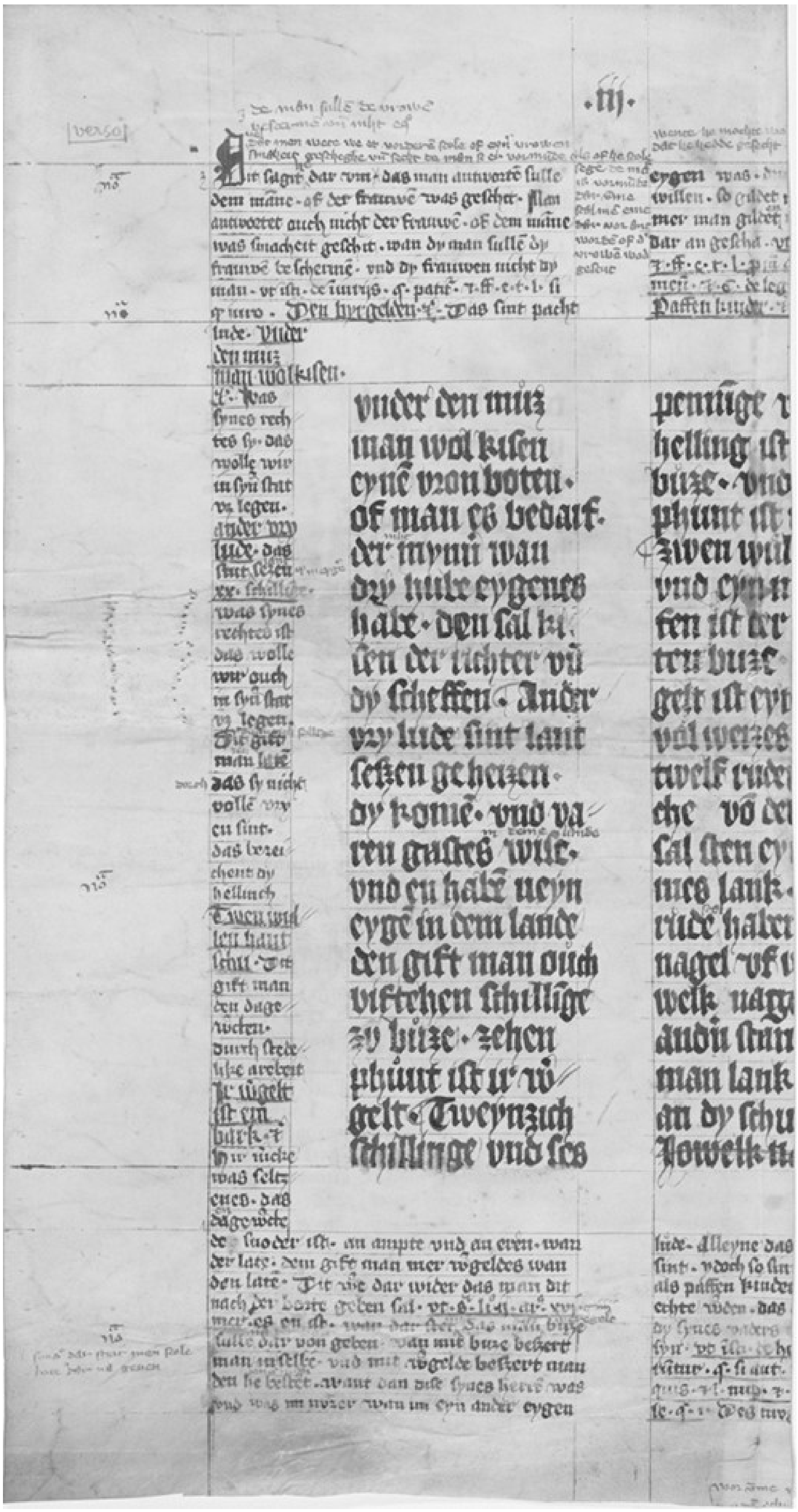
The use of meaningful books in legal rituals may not be representative of the manifold functions books and written documents can fulfill in the legal sphere. But it serves as an example for the general hypothesis that books can be a clue for analyzing how the legal sphere interacts with other spheres (here the political and the religious). Additionally, the example demonstrates that the analysis of the materiality, the contents, the p. 75 provenance, ↳ and the (assumed) performance have to be taken into account in order to determine the function of a book.

4.4 Codification and the Codex

In the second quarter of the thirteenth century Eike von Repgow produced the earliest custumal in the German-speaking areas: the *Saxon Mirror*. While the book started out as a "private" repository of legal custom, it gained more and more normative power and soon served as a model for municipal law, which was later adopted in Eastern Europe.[51] In some recent studies this kind of transformation has been interpreted as a form of codification.[52] It is characteristic of this form of codification that the legal elite ascribes authority to a legal work (e.g., by quoting or glossing it). Additionally, "the formal representation of a reference text may as such symbolize its institutional character."[53] Although the material aspect is only one element in the complex process of codification, codification is related to the mediality of a text, including—for the European Middle Ages—the shape of the codex.

In the case of the *Saxon Mirror* various strategies of making it a book of reference can be differentiated, in particular the attempt to make it look like an academic book. Although the reception of Roman law and the development toward codification of canon law probably sparked the project of writing down customary law, the *Saxon Mirror* does not have a clear compositional structure like, for example, the *Decretum Gratiani*, which had become a model for arranging knowledge (together with authoritative theological texts).[54] The text of the *Saxon Mirror* has been transmitted in several versions, which all bear witness to efforts to give the text a formal structure retrospectively (division into "books" and paragraphs, introduction of numbering, table of contents, indices, etc.).[55] Furthermore, in the second quarter of the fourteenth century the text of p. 76 the *Saxon Mirror* was endorsed by a gloss in the style of glosses on Roman law: in his ↳ commentary Johannes von Buch tried to harmonize Saxon and Roman law.[56] What is, however, more important in the context of book history is the use of references (*allegationes*), which made links to other authoritative texts visible. Moreover, in some manuscripts of the *Saxon Mirror* that also include the gloss the typical chain link (*catena*) layout of the *Glossa ordinaria* has been adopted; this gives the *Saxon Mirror* the design of a law code. As can be seen from the fragment of a fourteenth-century manuscript (Figure 4.3),[57] the importance of the main text is highlighted by the sheer size of the script. The hierarchy between the main body of the text and the commentary could also be expressed by the use of different types of script, a technique taken up later in print.[58] In any case, the page layout acknowledges the integrity and normativity of the main text, while planting it within the legal tradition.

Figure 4.3



vnder den mitz
man wol kisen
cynē vron boten·
of man es bedarf·
der mynnē wan
dy hulde eygenes
habe· den sal ki-
sen der richter vn̄
dy scheffen· Ander
vry lude sint lant
setzen geheizen·
dy komē· vnd va
ren gastes wise·
vnd en habē neyn
eygē in dem lande
den gift man ouch
viftehen schillīge
zv buze· zehen
phunt ist ir w̄
gelt· Tweynzich
schillinge vnd ses

Fragment of a fourteenth-century manuscript of the *Saxon Mirror*, with the gloss by Johannes von Buch.

(Göttingen, SUB, Cod. Ms. W. Müller I, 12v; © SUB Göttingen. Reprinted by permission.)

Apart from making it look like an academic book, the *Saxon Mirror* was invested with imperial authority: it was frequently combined with the *Imperial Landpeace of Mainz* of 1235. This is, for instance, the case in two related illuminated copies of the *Saxon Mirror* made in the second half of the fourteenth century, where the *Imperial Landpeace of Mainz*, with the depiction of Emperor Frederick II, opens the respective manuscripts.[59]

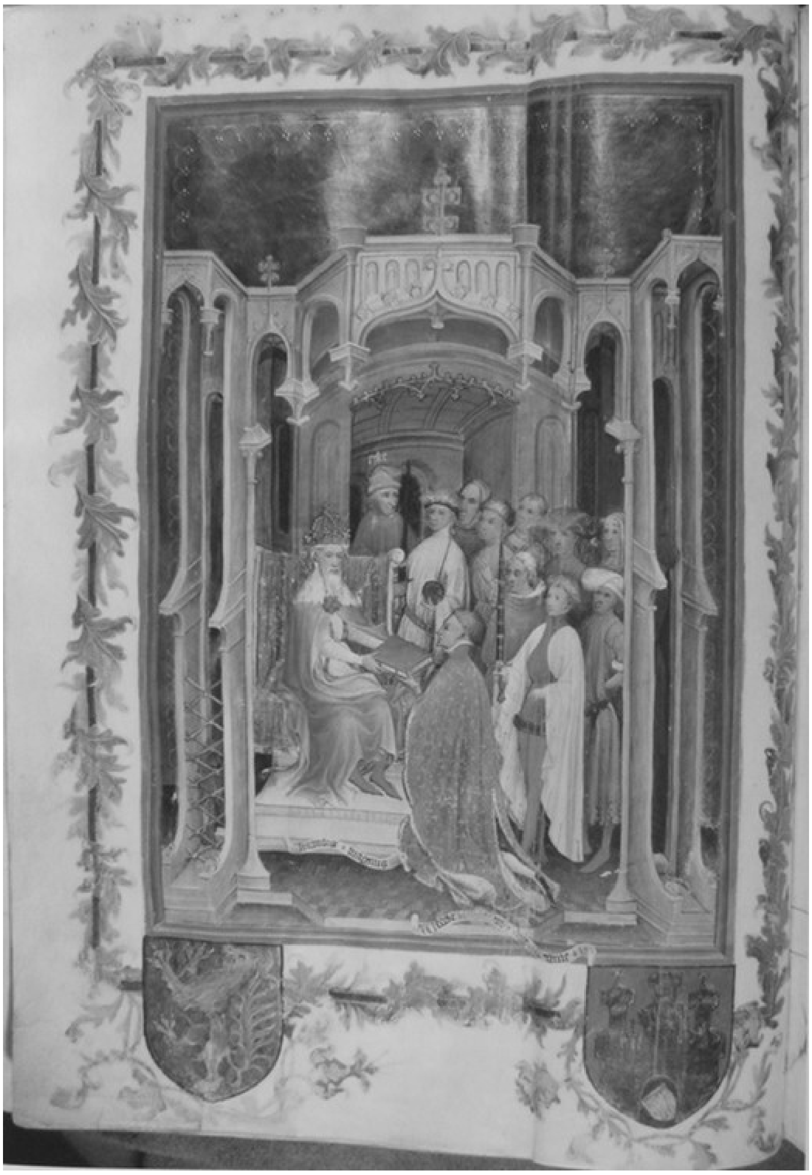
His posture corresponds to that of the emperors Constantine and Charlemagne at the beginning of the *Saxon Mirror*, who are depicted instructing the book's author.[60] Constantine and Charlemagne are mentioned in the prologue (*textus prologi*) as Christian legislators. Already in the second half of the thirteenth century the *Saxon Mirror* was interpreted as "a privilege that had been granted to the Saxon people by the Emperor Charlemagne. This theory became highly influential, as it was used as a central argument in *Buch's Gloss*."[61] Based on this legend, an early fifteenth-century copy of the *Saxon Mirror* (with the gloss) designed for the town council in Lüneburg (where this text was used as the primary subsidiary legal source) received a lavish picture page showing Charlemagne giving a book to the Saxon duke Widukind (Figure 4.4). The scene is ↳ p. 77

p. 78 ↳

p. 79 ↳

watched by Eike von Repgow and members of the town council.[62] Here, the book has become a symbol for the law code. Remains of a book chain attached to the cover suggest that the book containing this picture page was displayed in a public place, at least accessible to the members of the council. In the miniature they are directly addressed by the corresponding figures (shown together with historical figures from earlier eras) and thus admonished to respect the law given to them by the emperor.

Figure 4.4

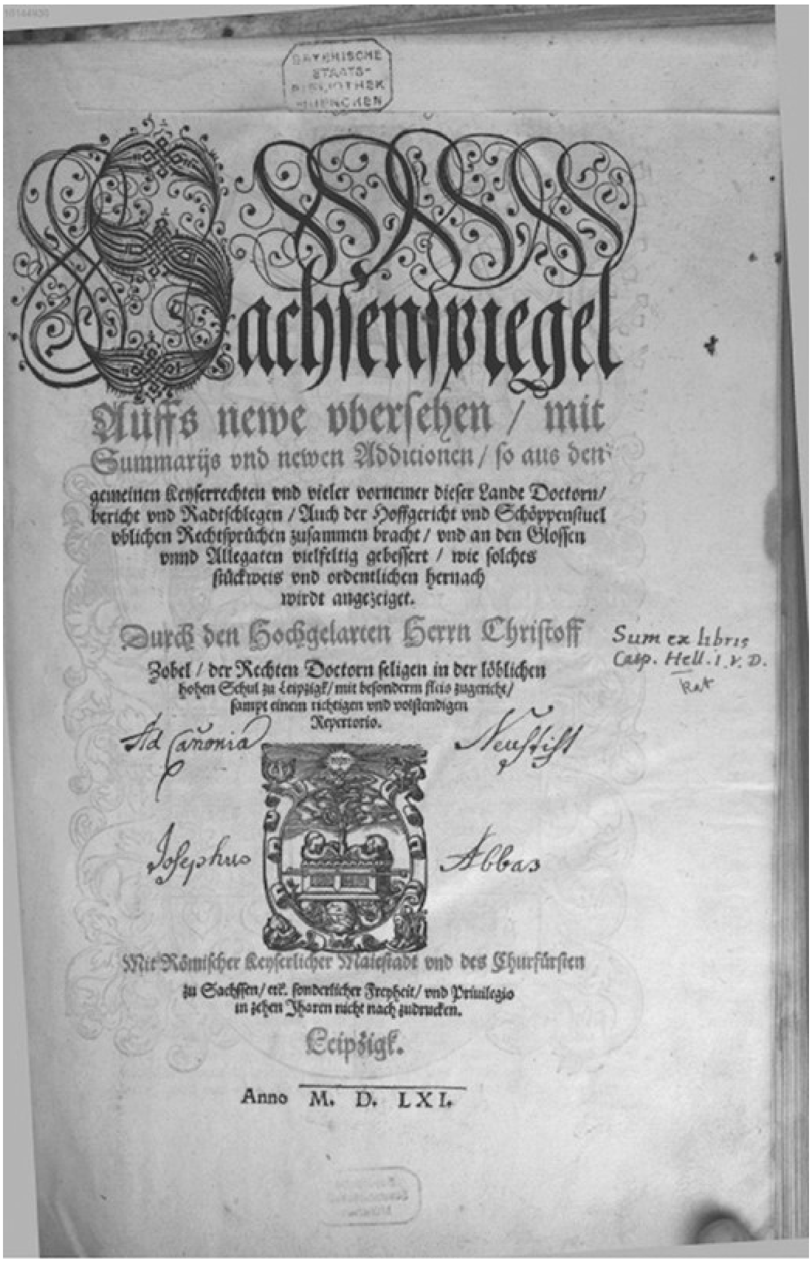


Page from an early fifteenth-century manuscript of the *Saxon Mirror*: Charlemagne gives the *Saxon Mirror* to the Saxon duke Widukind; the scene is watched by Eike von Repgow and members of Lüneburg's town council.

(Lüneburg, Ratsbücherei, Ms. Jurid. 2, fol. 20v; © Ratsbücherei Lüneburg. Reprinted by permission.)

Unlike "proper" law codes from later periods, which follow a different logic of codification (e.g., the *Code Napoléon*), the *Saxon Mirror* was not printed later by state-run printing houses. Interestingly, the most widespread print in the sixteenth century boasts another kind of privilege issued by the Holy Roman Emperor (Ferdinand I) and the Elector of Saxony (August): an interdiction to reprint this version (Figure 4.5). The reason is not connected with the legal nature of the text but with the work done by the jurist Christoph Zobel (1499–1560), who transformed the text into Early Modern German, translated it into Latin, and added summaries and an index as well as a Latin and a German gloss.[63] Although the interdiction on the title page is related to "copyright" reasons, it still creates the notion that there is imperial control of the printing of the *Saxon Mirror*.[64]

Figure 4.5



BAYERISCHE STAATS-BIBLIOTHEK MÜNCHEN

Sachſenſpiegel
Auffs newe vberſehen / mit
Summarijs vnd newen Addicionen / ſo aus den
gemeinen Keyſerrechten vnd vieler vorneiner dieſer Lande Doctorn/
bericht vnd Radtſchlegen / Auch der Hoffgericht vnd Schöppenſtuel
vblichen Rechtſprüchen zuſammen bracht / vnd an den Gloſſen
vnnd Allegaten vielfeltig gebeſſert / wie ſolches
ſtückweis vnd ordentlichen hernach
wirdt angezeiget.
Durch den Hochgelarten Herrn Chriſtoff
Zobel / der Rechten Doctorn ſeligen in der löblichen
hohen Schul zu Leipzigk / mit beſonderm fleis zugericht /
ſampt einem richtigen vnd volſtendigen
Repertorio.

Sum ex libris
Casp. Hell. I.V.D.
Rat

Ad Canonia
Neustift
Josephus
Abbas

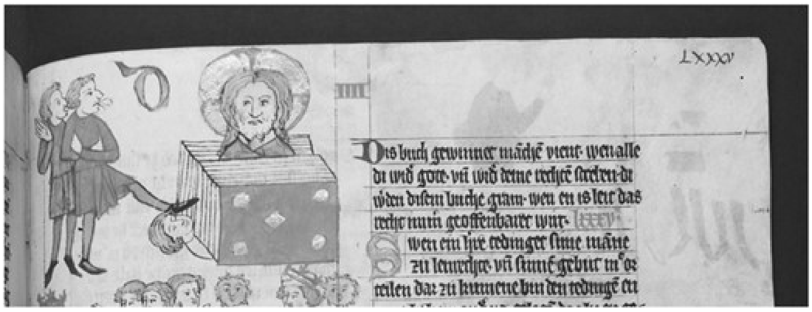
Mit Römiſcher Keyſerlicher Maieſtadt vnd des Churfürſten
zu Sachſſen / etc. ſonderlicher Freyheit / vnd Priuilegio
in zehen Jharen nicht nach zudrucken.
Leipzigk.
Anno M. D. LXI.

The *Saxon Mirror* edited by Christoph Zobel, printed in Leipzig (Vögelein) in 1561.

(Munich, Bayerische Staatsbibliothek, 2 J.germ. 110 a, BSB-ID 12945609, VD 16 D 751, title page, http://reader.digitale-sammlungen.de/de/fs1/object/display/bsb10144930_00009.html.)

The codification of Saxon customary law shows that the codex can convey the impression of the law's normativity in different ways: by treating the text as a canonical text that needs a commentary, or by framing it with paratexts or images, which point to an imperial legislator. Both the function of images and the relation of knowledge management to legal studies deserve further attention beyond the aspect of codification.[65] But the example sufficiently demonstrates how codices are invested with power. The medieval illustrators of the *Saxon Mirror* went as far as identifying the book with the law, for they depicted the enemies of justice attacking a book containing the law authorized by the divine (Figure 4.6).[66]

Figure 4.6



Page from a manuscript of the *Saxon Mirror* made in the third quarter of the fourteenth century: enemies of justice attacking a law book (the *Saxon Mirror*), authorized by the divine, and its author.

(Wolfenbüttel, Herzog August Bibliothek, Cod. 3.1 Aug. 2°, fol. 85r, detail; © Herzog August Bibliothek Wolfenbüttel, http://diglib.hab.de/mss/3-1-aug-2f/start.htm?image=00199 (CC BY-SA 3.0 DE).)

p. 80
p. 81

4.5

↳

Collection, Compilation, Amalgamation: “Law” and “Literature” in Manuscripts

In medieval manuscripts a legal text frequently appears together with other texts. The integration of the *Saxon Mirror* into legal compendia has already been touched upon. Further, the *Saxon Mirror* and its later reworking, the *Swabian Mirror* (dated to 1275–1276), each became part of miscellaneous collections, which primarily point to the interests of the owner of each manuscript. When the *Swabian Mirror*, for example, is combined with a calendar (containing rules on what to do in each month) and with rules for bloodletting as in a Bavarian manuscript from the fifteenth century,[67] this combination of texts is a valuable source for exploring the contexts in which legal texts were preserved and read, but the texts do not closely interact with each other on the level of content. Even within a single manuscript, however, the texts can interrelate in different ways: in addition to the texts already specified, the Bavarian manuscript comprises local customary and municipal laws (*Oberbayerisches Landrecht, Stadtrecht für Wasserburg*) as well as a German version of the *Belial* (based on the Latin text by Jacobus de Theramo), a fictive lawsuit between Lucifer and p. 82 Jesus Christ on the salvation of mankind, which gained importance ↳ as a tool for teaching Roman law and canon law.[68] The governing aim for the entire collection, apparently, is to assemble all kinds of pieces of knowledge regarded as useful by the owner, but in the legal section the assembly also influences their reception: by combining texts that had assumed normative power and a treatise in literary form, the instructive character of both is stressed rather than their practical or literary character.

The mutual influence of texts within one manuscript will be enhanced if they are more closely connected: the *Swabian Mirror* may again serve as an example because in some of its extant manuscripts its normative part appears combined with history writing or short verse narratives. In the *Swabian Mirror*, which shows a Franciscan influence, the historical elements already inherent in the *Saxon Mirror* have been increased, not least by the addition of an introduction consisting of narratives about kings from the Old Testament (*Buch der Könige*). They serve as models of good judging and ruling. In some manuscripts a prose version of the verse chronicle *Kaiserchronik* is inserted after the introductory part. The *Kaiserchronik* in prose seems to have been designed as an integral part of the *Swabian Mirror*, for the legislative power of Charlemagne is highlighted, and it is mentioned that he had his children learn about the law, which their masters read to them from books. Thus, the historical norms laid out in the subsequent part receive a historical foundation;

additionally, the chronicle in prose provides models of how to use law books. Probably the *Buch der Könige* and the *Kaiserchronik* in prose were both part of the original concept of the *Swabian Mirror*, but the *Swabian Mirror* is transmitted independently of the historical sections in most manuscripts.[69] This situation could point to an awareness of the differences between more or less pragmatic genres. At the same time, the transmission of the *Swabian Mirror* also provides evidence that narratives could be used for pragmatic purposes. Short verse narratives on legal themes by an author called "Der Stricker" have been included in some manuscripts of the *Swabian Mirror* or its direct precedent, the *Mirror of the Germans*. While a narrative like Stricker's "The Judge and the Devil" is open to interpretation, especially if transmitted independently, it is intended to serve as a warning against corrupt judges in the context of the *Swabian Mirror*; thus it is p. 83 meant to adopt the character of an *exemplum*, even ↳ though other layers of meaning cannot be suppressed.[70] In any case, its narrative quality enriches the abstract character of the *Swabian Mirror* in transferring non-propositional knowledge by providing characters of identification. "Literature" merges with the legal text.

As has just been outlined, studying books as collections of texts gives access to the meaning produced by the interaction of textual units. In this case book history does not focus on the materiality of the codex but on the textual entity defined by the physical object. The results can contribute to other fields of study: as for the *Swabian Mirror*, narrative and normative elements appear sometimes closely intertwined, sometimes separated in its textual history. Analyzing these constellations sheds light on the complex relationship between "law" and "literature." It goes without saying that in other cases insights in this field can be gained by a stronger focus on the material object itself. This is especially true for illustrated versions of literary texts, where the interpretation of the story in images can, for example, convey legal concepts[71] or highlight certain forms of legal communication.[72] In these cases it is still the codex that creates a semantic unit, but "law" and "literature" can also be intertwined more narrowly: in Middle English literature there is a tradition of poems interpreting Christ's crucified body as a legal document, thus stressing the legal aspects of the salvation of mankind. These poems not only adopt the textual form of a charter, but they sometimes also imitate the material form of a copied charter, including, for instance, a painted seal with the side wound.[73] In their amalgamation of textual genres and their characteristic material forms, these "Charters of Christ" impressively document that book history can be key in analyzing the interaction of "law" and "literature."

4.6 Topics for Further Research

Book history is closely focused on material objects. Even when the broader context of distribution of and
access to certain kinds of books is being analyzed, the research in book history depends on case studies.
p. 84 Since the books are interpreted as meaningful ↳ objects within a particular culture, it is no wonder that
studies in book history and law are often restricted to specific periods and areas, although there has been an
increasingly transnational perspective in recent works both in book history[74] and in law, culture, and the
humanities.[75] These case studies are indispensable and have great merit in uncovering underlying
structures, e.g., the interplay of media history and ways of enacting power.[76] In addition, it would be worth
reviewing and collecting case studies on book culture and law from different parts of the world.[77] Such a
systematic comparative approach would, for example, shed new light on patterns for the transition from
handwritten manuscripts to printing and its effect on legal transactions. While manuscripts are included in
broader concepts of book history, the Western idea of an “Age of Printing” still appears to be influential,
and more recent manuscript cultures seem to be rarely discussed in terms of an intercultural and diachronic
scope. Despite the danger of generalizations, intercultural studies would open up the opportunity to
distinguish systematic aspects of the interrelation between media history and the law from those issues
specific to cultural communities. Further, a transnational book history in the legal sphere could enrich
research on transplants and reception in comparative law.[78] For the Middle Ages, for example, there is no
doubt that legal centers like Bologna (for Roman law) and Magdeburg (for Saxon and Magdeburgian Law)
sparked the spread of legal ideas, but research on the actual travel of books and the adaptation of layouts
has only begun.[79]

p. 85 A second area for research is the transformation of printing into digital cultures. The ongoing debates on copyright and intellectual property make it obvious that this process of change has legal aspects, and these aspects have, so far, mainly been studied by scholars of book history who focus on the book trade.[80] It remains to be seen how going digital will affect legal culture itself:[81] what role will digital texts play in the courtroom?[82] Will books keep their significance in public legal rituals? And how will the changing media further transform legal thinking?[83] This is an evolving field of book history in a broader sense.

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1 See Jack Goody, *The Logic of Writing and the Organization of Society* (Cambridge: Cambridge University Press, 1989), 127–170; D. F. McKenzie, *Bibliography and the Sociology of Texts* (Cambridge: Cambridge University Press, 1999), 77–130; Thomas Vesting, *Legal Theory and the Media of Law* (Northampton, MA: Edward Elgar, 2018). (Originally published in German in four volumes, 2011–2015.)

2 See, e.g., Johannes Renger, “Noch einmal: Was war der ‘Kodex’ Ḫammurapi—ein erlassenes Gesetz oder ein Rechtsbuch?” in *Rechtskodifizierung und soziale Normen im interkulturellen Vergleich*, ed. Hans-Joachim Gehrke (Tübingen, Germany: Narr Verlag, 1994), 27–58.

3 The discussion is summarized in Joachim Willeitner, “Pergament. Ein Datenträger für die Ewigkeit,” *Spektrum der Wissenschaft. Die Woche* 26/2016, first published in *Spektrum.de* (June 24, 2016, http://www.spektrum.de/news/pergament-konserviert-die-geschichte/1414311, accessed August 11, 2018.)

4 See, e.g., Kasia Solon Cristobal, “From Law in Blackletter to Blackletter Law,” *Law Library Journal* 108, no. 2 (2016): 181–216.

5 McKenzie, *Bibliography*, 9.

6 http://www.sharpweb.org/main/, accessed August 11, 2018.

7 Ezra Greenspan and Jonathan Rose, “Introduction,” *Book History* 1 (1998): ix–xi, at ix. Despite the broad subject area, Greenspan and Rose opt for the label “book history”: “ ‘Book history’ is the least unsatisfactory name for this scholarly frontier, which is certainly not limited to books—or to historians.”

8 See David Finkelstein and Alistair McCleery, *An Introduction to Book History*, 2nd ed. (London: Routledge, 2013), 15f.

9 See Finkelstein and McCleery, *Introduction*, 7; Stephan Füssel and Corinna Norrick-Rühl, *Einführung in die Buchwissenschaft* (Darmstadt, Germany: Wissenschaftliche Buchgesellschaft, 2015), 8, 12.

10 See Füssel and Norrick-Rühl, *Einführung*, 38.

11 Füssel and Norrick-Rühl (*Einführung*, 12) speak of a hybrid methodology, which is enriched by recent developments in Digital Humanities (ibid., 45f.; see Stephen Robertson’s chapter, “Digital Humanities,” in this volume).

12 See Stephen G. Nichols, “Why Material Philology? Some Thoughts,” *Zeitschrift für Deutsche Philologie* 116 (1997): 10–30 (Sonderheft: *Philologie als Textwissenschaft: Alte und Neue Horizonte*, ed. Helmut Tervooren and Horst Wenzel); Susan Yager, “New Philology,” in *Handbook of Medieval Studies: Concepts, Methods, Terms, Historical Developments and Current Trends*, ed. Albrecht Classen (Berlin, Germany: Walter de Gruyter, 2010), 999–1006.

13 See Peter L. Shillingsburg, *Resisting Texts: Authority and Submission in Constructions of Meaning* (Ann Arbor: University of Michigan Press, 1997), 73f.

14 See Patrick Sahle, *Digitale Editionsformen: Zum Umgang mit der Überlieferung unter den Bedingungen des Medienwandels. Part 3. Textbegriffe und Recodierung* (Norderstedt, Germany: Books on Demand, 2013), 26–37; 53–60, urn:nbn:de:hbz:38–50130.

15 See Finkelstein and McCleery, *Introduction*, 101–118.

16 Rautenberg (“Buchwissenschaft in Deutschland: Einführung und kritische Auseinandersetzung,” in *Buchwissenschaft in Deutschland: Ein Handbuch*, ed. U. Rautenberg (Berlin, Germany: Walter de Gruyter, 2013), 3–64, at 47–59) critically reviews the attempts to reframe Book History as media studies.

17 For the local traditions in Germany (and Austria) see the contributions in *Buchwissenschaft in Deutschland* (n. 16), 801–1029.

18 See Finkelstein and McCleery, *Introduction*, 11f.; Füssel and Norrick-Rühl, *Einführung*, 42f.

19 See Füssel and Norrick-Rühl, *Einführung*, 7–12.

20 Cf., e.g., the emerging institutionalization of “Medienkulturwissenschaft” in Germany.

21 See, e.g., Meredith L. McGill, “Copyright and Intellectual Property: The State of the Discipline,” *Book History* 16 (2013): 387–427.

22 See Andrew Gilden’s chapter, “Intellectual Property’s Queer Turn,” in this volume.

23 See McKenzie, *Bibliography*, 77–130.

24 António Manuel Hespanha, “Form and Content in Early Modern Legal Books: Bridging the Gap between Material Bibliography and the History of Legal Thought,” *Rechtsgeschichte* 12 (2008): 12–50.

25 E.g., Ulrich-Dieter Oppitz, *Deutsche Rechtsbücher des Mittelalters*, 3 vols. (Cologne, Germany: Böhlau, 1990–1992).

26 E.g., Ruth Schmidt-Wiegand, “Gebrauchssituation im Spiegel der Mitüberlieferung: Die deutschen Rechtsbücher des 13. und 14. Jahrhunderts in ihren Codices,” in *Der Codex im Gebrauch*, ed. Christel Meier, Dagmar Hüpper, and Hagen Keller (Munich, Germany: Fink, 1996), 69–86; M. H. Hoeflich, “Legal History and the History of the Book: Variations on a Theme,” *University of Kansas Law Review* 46 (1998): 415–431; Vincenzo Colli, ed., *Juristische Buchproduktion im Mittelalter* (Frankfurt/Main, Germany: Vittorio Klostermann, 2002); Susanne Lepsius, “Bartolus-Handschriften aus Halberstädter Beständen als exemplarische Beispiele für juristische Leseinteressen im Spätmittelalter—insbesondere der Traktat *De insigniis et armis*,” in *Rechtshandschriften des deutschen Mittelalters: Produktionsorte und Importwege*, ed. Patrizia Carmassi and Gisela Drossbach (Wiesbaden, Germany: Harrassowitz, 2015), 261–283.

27 E.g., Jeanette Rauschert, “Gelöchert und befleckt: Inszenierung und Gebrauch städtischer Rechtstexte und spätmittelalterliche Öffentlichkeit,” in *Text als Realie*, ed. Karl Brunner and Gerhard Jaritz (Vienna, Austria: Österreichische Akademie der Wissenschaften, 2003), 163–181; Simon Teuscher, *Erzähltes Recht: Lokale Herrschaft, Verschriftlichung und Traditionsbildung* (Frankfurt/Main, Germany: Campus, 2007).

28 E.g., Robert Marichal, “Les manuscrits universitaires,” in *Mise en page et mise en texte du livre manuscript*, ed. Henri-Jean Martin and Jean Vezin (Paris: Promodis, 1990), 211–218; Jaqueline Rambaud, “Le Décret de Gratien,” in *Mise en page et mise en texte du livre manuscript*, ed. Henri-Jean Martin and Jean Vezin (Paris: Promodis, 1990), 201–204; Jaqueline Rambaud, “Les Décrétales,” in *Mise en page et mise en texte du livre manuscript*, ed. Henri-Jean Martin and Jean Vezin (Paris: Promodis, 1990), 205–210; Susan L’Engle and Robert Gibbs, *Illuminating the Law: Legal Manuscripts in Cambridge Collections* (London: Harvey Miller, 2001); *AusBILDung des Rechts: Systematisierung und Vermittlung von Wissen in*

mittelalterlichen Rechtshandschriften, ed. Kristin Böse and Susanne Wittekind (Frankfurt/Main, Germany: Peter Lang, 2008); Hanna Sofia Hayduk, *Rechtsidee und Bild: Zur Funktion und Ikonografie der Bilder in Rechtsbüchern vom 9. bis zum 16. Jahrhundert* (Wiesbaden, Germany: Reichert, 2011); *Rechtshandschriften des deutschen Mittelalters: Produktionsorte und Importwege*, ed. Patrizia Carmassi and Gisela Drossbach (Wiesbaden, Germany: Harrassowitz, 2015).

29 https://illuminierte-urkunden.uni-graz.at/, accessed August 11, 2018.

30 E.g., Franziska Prinz, *Der Bildgebrauch in gedruckten Rechtsbüchern des 15. bis zum Anfang des 18. Jahrhunderts* (Hamburg, Germany: LIT Verlag, 2006).

31 E.g., *The Power of the Book: Medial Approaches to Medieval Nordic Legal Manuscripts*, ed. Lena Rohrbach (Berlin, Germany: Nordeuropa-Institut der Humboldt-Universität, 2014).

32 E.g., Annelise Riles, *The Network Inside Out* (Ann Arbor: University of Michigan Press, 2000).

33 Vesting, *Legal Theory.*

34 See Hyo Yoon Kang and Sara Kendall's chapter, "Legal Materiality," Carolin Behrmann's chapter, "Law, Visual Studies, and Image History."

35 For the English Middle Ages, see J. H. Baker, *An Introduction to English Legal History*, 4th ed. (London: Butterworths, 2002), 75–194. The function of the respective genres is a topic in its own right (see, e.g., *Law Books in Action: Essays on the Anglo-American Legal Treatise*, ed. Angela Fernandez and Markus Dubber (Oxford: Hart, 2012), on treatises in common law).

36 See, e.g., a page (fol. 123r) in an edition of the *Code of Justinian*, printed in Lyon in 1627, with the *Glossa ordinaria* by Accursius supplemented by further notes (Heidelberg, Universitätsbibliothek, I 696 Folio RES: 1; PURL: http://digi.ub.uni-heidelberg.de/diglit/justinian1627bd1/0127). The page displays a combination of the medieval tradition (with the gloss framing the text) and the later technique of placing citations and comments in the margins (see Ian Maclean, *Interpretation and Meaning in the Renaissance: The Case of Law* (Cambridge: Cambridge University Press, 1992), 37f.; Simon Stern, "Margins of Authority: Coke's *Institutes* and the Epistemology of the String Cite," *Law and Humanities* 11, no. 1 (2017): 121–136).

37 See Schmidt-Wiegand, "Gebrauchssituation," 74f.

38 But see Hespanha, "Form and Content," 12.

39 See Philipp Hofmeister, *Die christlichen Eidesformen: Eine liturgie- und rechtsgeschichtliche Untersuchung* (Munich, Germany: Karl Zink Verlag, 1957), 38–61 (also for what follows); Karl Groß, *Menschenhand und Gotteshand in Antike und Christentum*, ed. Wolfgang Speyer (Stuttgart, Germany: Anton Hiersemann, 1985), 228f.

40 See Thomas Lentes, "*Textus Evangelii*: Materialität und Inszenierung des *textus* in der Liturgie," in "*Textus" im Mittelalter: Komponenten und Situationen des Wortgebrauchs im schriftsemantischen Feld*, ed. Ludolf Kuchenbuch and Uta Kleine (Göttingen, Germany: Vandenhoeck & Ruprecht, 2016), 133–148.

41 On the contemporary situation, see Nomi M. Stolzenberg's chapter, "From Eternity to Here: Divine Accommodation and the Lost Language of Law," in this volume.

42 Mainz, Stadtbibliothek Mainz, Hs II 3 (URN: urn:nbn:de:0128-3-1053), fol. 61r–72ar.

43 Vienna, Kunsthistorisches Museum, Schatzkammer, WS XIII 18 (PURL: www.khm.at/de/object/6912d2c14c/).

44 See Susanne Wittekind, "*Lex* und *iuramentum:* Gott als Wahrheitszeuge und Rechtsgarant in spanischen Gesetzescodices," in *Das Gesetz—The Law—La Loi*, ed. Andreas Speer and Guy Guldentops (Berlin, Germany: Walter de Gruyter, 2014), 691–710, at 704.

45 See Johanna Christine Gummlich-Wagner, *Bildproduktion und Kontemplation: Ein Überblick über die Kölner Buchmalerei in der Gotik unter besonderer Berücksichtigung der Kreuzigungsdarstellung* (Weimar, Germany: VDG, 2003), 162–182.

46 See Julie Stone Peters's chapter, "Mapping Law and Performance: Reflections on the Dilemmas of an Interdisciplinary Conjunction," in this volume.

47 See Marion G. Müller, "Eid und Ehre: Politische Eidesleistungen zwischen christlicher Tradition und zivilreligiösem Bekenntnis," in *Säkularisierung und Resakralisierung in westlichen Gesellschaften: Ideengeschichtliche und theoretische Perspektiven*, ed. Mathias Hildebrandt, Manfred Brocker, and Hartmut Behr (Wiesbaden, Germany: Westdeutscher Verlag, 2011), 203–213, at 208; Daniel L. Dreisbach, *Reading the Bible with the Founding Fathers* (Oxford: Oxford University Press, 2017), 208–210 (also on doubts about Washington's words).

48 See Frederick B. Jonassen, "'So Help Me?' Religious Expression and Artifacts in the Oath of Office and the Courtroom Oath," *Cardozo Public Law, Policy & Ethics Journal* 12 (2014): 303–373, at 308f.

49 See Jeffrey F. Siker, *Liquid Scripture: The Bible in a Digital World* (Minneapolis, MN: Fortress Press, 2017), 9.

50 See Douglas A. Hicks, *With God on All Sides: Leadership in a Devout and Diverse America* (Oxford: Oxford University Press, 2009), 109–112.

51 See Rolf Lieberwirth, "Die Wirkungsgeschichte des *Sachsenspiegels*," in *Eike von Repgow, Sachsenspiegel: Die Wolfenbütteler Bilderhandschrift COD. GUELF. 3.1. AUG. 2°. Kommentar*, ed. Ruth-Schmidt-Wiegand (Graz, Austria: Akademische Druck- und Verlagsanstalt, 2006), 63–86; Heiner Lück, *Der Sachsenspiegel: Das berühmteste deutsche Rechtsbuch des Mittelalters* (Darmstadt, Germany: Wissenschaftliche Buchgesellschaft, 2017), 118–143.

52 See Heikki Pihlajamäki's chapter, "Legal Codes as Cultural Products," in this volume; Nils Jansen, *The Making of Legal Authority: Non-Legislative Codifications in Historical and Comparative Perspective* (Oxford: Oxford University Press, 2010), 23–27; Emmanuele Conte and Magnus Ryan, "Codification in the Western Middle Ages," in *Diverging Paths? The Shapes of Power and Institutions in Medieval Christendom and Islam*, ed. John G. Hudson and Ana María Rodríguez López (Leiden, The Netherlands: Brill, 2014), 75–97 (with a discussion of different concepts of codification).

53 Jansen, *Making*, 140.

54 See Ann M. Blair, *Too Much to Know: Managing Scholarly Information Before the Modern Age* (New Haven, CT: Yale University Press, 2010), 37.

55 See Oppitz, *Deutsche Rechtsbücher*, vol. 1, 21–32; Lieberwirth, "Wirkungsgeschichte," 64–68 (on the textual history); Richard H. Rouse and Mary A. Rouse, "Concordances et index," in *Mise en page et mise en texte du livre manuscript*, ed. Henri-Jean Martin and Jean Vezin (Paris: Promodis, 1990), 219–228 (generally on finding aids).

56 See Lieberwirth, "Wirkungsgeschichte," 69–71; Bernd Kannowski, *Die Umgestaltung des Sachsenspiegelrechts durch die Buch'sche Glosse* (Hannover, Germany: Hahn, 2007); Lück, *Sachsenspiegel*, 118–129.

57 See SUB Göttingen, Cod. Ms. W. Müller I, 12 (fourteenth century). Cf. Figure 4.1 (the technique of framing the main text with a gloss goes back to an earlier manuscript tradition).

58 See Cristobal, "Blackletter Law," 196–198; Stern, "Margins," 135f.

59 See Dresden, Landesbibliothek, Mscr. M 32, fol. 1r, http://digital.slub-dresden.de/werkansicht/dlf/6439/9/0/, accessed August 11, 2018; Wolfenbüttel, Herzog August Bibliothek, Cod. 3.1 Aug. 2°, fol. 1r, PURL: http://diglib.hab.de/mss/3-1-aug-2f/start.htm?image=00031.

60 See Dresden Landesbibliothek, fol. 3v, http://digital.slub-dresden.de/werkansicht/dlf/6439/14/0/, accessed August 11, 2018; Wolfenbüttel, Herzog August Bibliothek, fol. 9v, PURL: http://diglib.hab.de/mss/3-1-aug-2f/start.htm?image=00048. On the similarity of the postures see Ruth Schmidt-Wiegand, "Autor und Illustrator in den Bilderhandschriften des *Sachsenspiegels*," in *Wirkungen europäischer Rechtskultur: Festschrift für Karl Kroeschell zum 70. Geburtstag*, ed. Gerhard Köbler and Hermann Nehlsen (Munich, Germany: Beck, 1997), 1043–1064, at 1053.

61 Jansen, *Making*, 26.

62 See Lüneburg, Ratsbücherei, Ms. Jurid. 2, fol. 20v (see Lück, *Sachsenspiegel*, 47). See Ulrich Drescher, "Die Lüneburger Ratshandschriften des *Sachsenspiegels*," in *Der Sachsenspiegel als Buch*, ed. Ruth Schmidt-Wiegand and Dagmar Hüpper (Frankfurt/Main, Germany: Peter Lang, 1991), 105–142, 441–453; Norbert H. Ott, "Reich und Stadt: Karl der Große in deutschsprachigen Bilderhandschriften," in *Karl der Große als vielberufener Vorfahr: Sein Bild in der Kunst der Fürsten, Kirchen und* Städte, ed. Lieselotte E. Saurma-Jeltsch (Sigmaringen, Germany: Jan Thorbecke, 1994), 87–111, at 108–111.

63 On Zobel's work see Lieberwirth, "Wirkungsgeschichte," 84; Lück, *Sachsenspiegel*, 121, 140–143. His version of the *Saxon Mirror* was first published in 1535–1537. I refer to an edition published in 1561 (Leipzig, Germany: Vögelein), Munich, Bayerische Staatsbibliothek, 2 J.germ. 110 a, BSB-ID 12945609, VD 16 D 751, PURL: http://www.mdz-nbn-resolving.de/urn/resolver.pl?urn=urn:nbn:de:bvb: 12-bsb10144930-2.

64 See Robert Spoo's chapter, "Legal Paratexts," in this volume.

65 See Carolin Behrmann's chapter, "Law, Visual Studies, and Image History"; Hillary Chute's chapter, "Comics"; and Valérie Hayaert's chapter, "Emblems"; all in this volume.

66 See Dresden, Landesbibliothek, Mscr. M 32, fol. 91r, http://digital.slub-dresden.de/werkansicht/dlf/6439/189/0/, accessed August 11, 2018, and Wolfenbüttel, Herzog August Bibliothek, fol. 85r, PURL: http://diglib.hab.de/mss/3-1-aug-2f/start.htm?image=00199.

67 See Schmidt-Wiegand, "Gebrauchssituation," 73f., on Munich, Bayerische Staatsbibliothek, Cgm 223 (1464–1465). For a description of the manuscript, see Karin Schneider, *Die deutschen Handschriften der Bayerischen Staatsbibliothek München: Cgm 201–350*. Editio altera (Wiesbaden, Germany: Harrassowitz, 1970), 81–85.

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74 Robert Fraser, *Book History Through Postcolonial Eyes: Rewriting the Script* (London: Routledge, 2008); Robert Fraser and Mary Hammond, *Books Without Boarders*, vol. 1: *The Cross-National Dimension in Print Culture*, vol. 2: *Perspectives from South Asia* (Basingstoke, U.K.: Palgrave Macmillan, 2008); Sydney J. Shep, “Imagining Post-National Book History,” *Papers of the Bibliographical Society of America* 104, no. 2 (June 2010): 253–268; Finkelstein and McCleery, *Introduction*, vif.; Füssel and Norrick-Rühl, *Einführung*, 44f.

75 See Elizabeth S. Anker and Bernadette Meyler, “Introduction,” in *New Directions in Law and Literature*, ed. Elizabeth S. Anker and Bernadette Meyler, 1–30, at 14, on law and literature.

76 Benito Rial Costas, “Marketing a New Legal Code in Fifteenth Century Castile: A Case Study of the Interactions Between Crown, Law and Printing,” in *Books in Motion in Early Modern Europe: Beyond Production, Circulation and Consumption*, ed. Daniel Bellingradt, Paul Nelles, and Jeroen Salman (London: Palgrave Macmillan, 2017), 87–108.

77 E.g., Bruce S. Hall and Charles C. Stewart, “The Historic ‘Core Curriculum’ and the Book Market in Islamic West Africa,” in *The Trans-Saharan Book Trade*, ed. Graziano Krätli and Ghislaine Lydon, 109–74 (Leiden, The Netherlands: Brill, 2011); Archie L. Dick, *The Hidden History of South Africa’s Book and Reading Cultures* (Toronto: University of Toronto Press, 2012); Hudson and Rodríguez López, Diverging Paths?, chapters 4–7 on “Law and Codification” (59–121); Ulrich Lau and Thies Staack, *Legal Practice in the Formative Stages of the Chinese Empire: An Annotated Translation of the Exemplary Qin Criminal Cases from the Yuelu Academy Collection* (Leiden, The Netherlands: Brill, 2016). The emphasis here lies not on book history, but on, e.g., the discussion of legal manuscripts as burial offerings (77).

78 For an overview, see Michele Graziadei, “Comparative Law as the Study of Transplants and Receptions,” in *The Oxford Handbook of Comparative Law*, ed. Mathias Reimann and Reinhard Zimmermann (Oxford: Oxford University Press, 2006), 442–475.

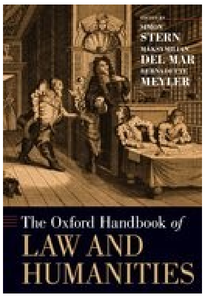
79 See Heiner Lück, “Einführung: Das sächsisch-magdeburgische Recht als kulturelles Bindeglied zwischen den Rechtsordnungen Ost- und Mitteleuropas,” in *Rechts- und Sprachtransfer in Mittel- und Osteuropa. Sachsenspiegel und Magdeburger Recht*, ed. Ernst Eichler and Heiner Lück (Berlin, Germany: Walter de Gruyter Recht, 2008), 1–28, at 7–24; Susan L’Engle, “The Transmission of Legal Manuscripts from Bologna and Padua to German Collections,” in *Rechtshandschriften des deutschen Mittelalters: Produktionsorte und Importwege*, ed. Patrizia Carmassi and Gisela Drossbach (Wiesbaden, Germany: Harrassowitz, 2015), 305–319.

80 McGill, “Copyright.”

81 See Stephen Robertson’s chapter, “Digital Humanities”; Tal Kastner’s chapter, “Form Contract”; and Steven Wilf’s chapter, “Legal Treatise,” all in this volume.

82 Cf., e.g., Eugene Volokh, “The Future of Books Related to the Law?” *Michigan Law Review* 108 (2010): 823–846.

83 On the role of computer networks, see Vesting, *Legal Theory*, part IV.



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CHAPTER

5 Digital Humanities

Stephen Robertson

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Abstract

Legal scholarship has its own distinctive place in the different disciplinary responses to digital humanities. It has long relied on databases of digitized sources and consequently on search as a research methodology. Computational tools provide means of addressing the limitations of search. This chapter surveys the use of computational tools to identify patterns of word use and borrowing and the diffusion of concepts in legal texts, to construct networks of relationships in texts and between individuals, to visualize spatial information, and to create 3D models of objects and structure as methods for both discovery and interpretation. These digital methods raise epistemological questions about how to address different questions and various kinds of sources, and what evidence is needed to support particular claims. Computational analysis expands the scale of the analysis, and the level of detail and context, making it possible to systematically explore claims about what is typical and representative and the periodization of historical discourses. Network graphs and maps visualize and measure relationships and spatial patterns in ways that capture a degree of complexity beyond what can be rendered in narrative. The implication of digital humanities for all humanities scholars is that we must look anew at our practices of research and analysis and critically reevaluate the nature and scope of the interpretative claims that we make.

Keywords: methodology, legal research, database, search, text analysis, topic modeling, mapping, networks, corpus linguistics, citation

Subject: Jurisprudence and Philosophy of Law, Law and Society, Law

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DIGITAL humanities gained prominence as a label with the publication in 2004 of *A Companion to Digital Humanities*, edited by Susan Schreibman, Ray Siemens, and John Unsworth. The field was not formed whole cloth but from an earlier generation of humanities computing. In part, the new label recognized the direction in which the Internet was taking work at the intersection of technology and humanities. The web offered new affordances for "the representation, sharing and discussion of knowledge."[1] At the same time, digitization and optical character recognition software transformed quantitative analysis by producing a new “mass data-fication of words” that made words available for computational analysis.[2]

Two broad threads characterize the current form of digital humanities. One centers on the distribution and presentation of material online, for scholarly audiences, for use in classrooms, and for different groups of the public. The second involves the use of computational tools to identify patterns of word use and borrowing and the diffusion of concepts in texts, to construct networks of relationships, to visualize spatial information, and to create 3D models of objects and structure as methods for both discovery and interpretation. Those threads are woven into disciplines differently depending upon the availability of digitized material, the questions scholars explore, and the audiences they seek. Whereas literary studies scholars, with machine-readable corpuses of literature available to them, have focused their computational analysis on text mining algorithms, for example, historians, whose textual sources are more often not printed or machine readable, and whose questions are generally tied to places, have favored digital mapping.

Law has its own distinctive place in this disciplinary story. Unsurprisingly given that the legal system is a prodigious producer of text, legal research was one of the first areas to be transformed by digitization. In the p. 88 United States, for example, in the 1970s LexisNexis ↳ and Westlaw introduced electronic databases containing the full text of decisions and have progressively expanded them to include all published federal court decisions and the decisions of the higher state courts. Gale’s *Making of Modern Law* databases include 22,000 English and American legal treatises, published trials, and US Supreme Court briefs and records. HeinOnline includes law reports, treatises, and a wide range of session bills, statutes, and published legal sources. Much of the published material from the years before 1923 can also be accessed through HathiTrust’s digital library and Google Books.[3]

This “digitized turn,” as historian Lara Putnam labels it, is typically thought of in terms of access. Documents are made available online, incidentally providing the machine-readable text required by the “digital turn” to computational methods such as text mining, mapping, and network graphs. However, that conception naturalizes the full-text searching by which we commonly access digitized documents, treating it as a direct interaction with a text or as a “finding aid analogous to a card catalog.”[4] In fact, search is a digital research method whose results are determined by algorithms that have the assumptions of their human creators built into them.[5] Given both the ubiquity and unexamined character of search, this consideration of what conjunctions exist between digital technologies, legal sources, and humanities methods will focus on the computational dimensions of digital humanities and begin with a critical examination of that digital technology in order to better appreciate what text mining algorithms, digital mapping, and network visualizations offer.

5.1 Search

Beginning in the 1980s, legal scholars have analyzed how the shift from using key numbers and digests to searching databases has changed the nature of legal research practices (as well as debated the extent to which it recast the law as a collection of facts and doctrines rather than a separate domain organized under general principles). In the age of print, lawyers' research in American case law centered on West Publishing Company's National Reporter System, which assigned a case one of thousands of topical key numbers that
p. 89 located it in an inflexible, multilayered classification scheme that ↳ allowed researchers to discover other court opinions on the same points of law. Electronic databases offered free-form search unmediated by the structure of West's system. Instead, users searched the full text of decisions for relevant cases by combining words and phrases, which required "making assumptions about the words judges would use to describe relevant points of law and translating those assumptions into properly structured research statements."[6] Whereas key numbers channeled researchers toward particular cases, searches could be run multiple times to retrieve as many relevant cases as possible, creating an "iterative, intuitive, and complex [research] process."[7]

The first type of search offered in legal databases, Boolean search, used words and connectors such as "and," "or," "not" to allow researchers to construct queries that created a path to documents matching those search criteria. An additional option to search by entering terms without connectors was added later. That additional type of search shifted the task of constructing queries that would return relevant results from the researcher to algorithms—step-by-step sets of instructions—developed by the database providers.[8] The results appear ranked by "relevance," a measure of fit with the search terms that is calculated using processes of prioritization, classification, association, and filtering. In legal databases algorithms determine relevance using automatic phrase recognition, case name recognition, proximity search between terms, coverage of terms, prominence and date of opinions, citation analysis, and jurisdiction. Such a ranking was particularly attractive to researchers facing large and complex collections of material. However, those processes, unlike Boolean search queries, are not visible to researchers; the companies that create databases do not share their algorithms. Keyword search is thus a black box, one that is variable and changing. Different databases containing the same legal records return different results for the same search, and different results at different times, as algorithms are developed and refined.[9]

Humanities scholars have only recently begun to subject their search practices to similar analysis. Where search in legal research focused on retrieving information, looking for cases relevant to a legal question, humanities research has used search "to test hypotheses and sort documents by relevance to their hypotheses."[10] Rather than searching for information, the goal is to discover what information exists, and
p. 90 determine ↳ whether the question implicit in the choice of terms is valid. Ted Underwood offers this example from literary studies:

> For instance, if I suspect that blushes are symbols of moral consciousness in nineteenth-century poetry, I can go to a database of primary sources and search for poems that contain both *blush* and *conscious*. If I find enough examples, I flesh out an article. If not, I usually keep trying until I succeed. Perhaps *blush* and *shame* would work better? … The search terms I have chosen encode a tacit hypothesis about the literary significance of a symbol, and I feel my hypothesis is confirmed when I get enough hits.[11]

Although the ease and speed with which multiple hypotheses can be tested allows for extensive experimentation, the effectiveness of search for hypothesis testing nonetheless relies on linguistic knowledge of the corpus to choose the right search terms.[12] Since it returns only the terms one enters, a search filters out any alternative hypotheses, producing a circular logic in which results can only be those expected to be relevant. As a result, keyword search works better for legal research that approaches the law on its own terms. The language of published legal records is marked by a repetitious and highly specialized vocabulary. In addition, the highly technical nature of legal language means that the correlation between words and meaning is much higher than in most textual sources, and the results of search are more likely to be relevant. By contrast, search for other topics requires knowledge of how they were organized at different historical moments. For example, Jeffrey Binder failed to term up discussions of machines prior to 1650 by searching for the term and near synonyms like engine and related terms like spring and wheel. Rather, the relevant discussions were associated with concepts like mathematics and magic and with totally alien terms such as "menadrie" and "plegnick."[13] Similarly, search requires knowledge of competing linguistic standards and practices that existed on the margins, such as dialect, slang, and languages other than English. In addition, search cannot capture relevant material expressed in metaphor, unusual spelling, and indirect references. Amanda Gailey points to Walt Whitman's poem "O Captain, My Captain" as an example. A famous homage to Abraham Lincoln that is arguably the most relevant text for a researcher seeking to examine the poet's treatment of the president, the poem does not include Lincoln's name and so would not be discovered by a search.[14]

The nature of full-text search has also shaped the hypotheses that humanities researchers tested, changing p. 91 the nature of the questions they pose. Search made it easy ↳ to mine narrowly defined themes not identifiable in card catalogs or finding aids. "If you could associate a theme with a set of verbal tics," Underwood argues, "you could suddenly turn up dozens of citations not mentioned in existing scholarship and discover something that was easy to call "a discourse."[15] For historians, by making it possible, in Lara Putnam's words, to "find without knowing where to look," search made "new realms of connection visible" and brought a new focus on tracing "individual people (or songs, or pamphlets, or phrases) … to observe at the micro level the processes that generate, in the aggregate, macro-level flows and connections."[16]

Of equal significance, search results are decontextualized. Breaking down the structures that contain texts is not without benefits. It has decoupled sources from archival structures shaped by colonial and national boundaries and the logics of governments and institutions, and from reading practices that privileged certain sections of texts such as newspapers over others.[17] It has also led researchers to use a wider range of sources. However, significant disadvantages attend those gains. Search offers no indication of the relative importance of its results. "In a database containing millions of sentences," as Ted Underwood notes, "full-text search can turn up twenty examples of anything."[18] This lack of context is a particular problem given that a lack of discussion of search as a method continues to allow the adequacy of evidence to be measured against what was possible in a world before digital search.

5.2 Computational Tools

The widespread use of search means that computational tools cannot be cast as a specialized approach outside the boundaries of general research practices. Searching has already taken researchers across that boundary. In that situation, computational tools can "discipline our term-searching" by addressing the limitations of search as a means of discovery and method of analysis.[19] In that way computational tools are necessary to any research that relies on search, as well as a means of asking questions beyond those possible with that tool. Using computational tools does require more specialized knowledge in part because they are not (yet) available in the databases in which legal research in conducted. But they are coming to those p. 92 platforms; Ravel, now part of Lexus, for ↳ example, includes a network visualization of relationships between cases in its platform.[20] But as with search tools, such commercial products will be black boxes. A better option is the free and open source platforms and tutorials for using computational tools developed in more than a decade of digital humanities projects.

However, getting access to material to use with computational tools continues to be a problem. In the case of commercial databases, as David Tanenhaus and Eric Nystrom note, “The sort of digital access appropriate for a traditional user, including limitations posed by the quantity of material available, the size and format of permitted downloads, the ease of machine interaction with the download interface, and the cost of licensing” does not provide the bulk access to obtain the text files necessary for computational analysis.[21] Currently, vendors such as Proquest and Gale are imposing additional charges for the access required for text mining, and even then delivering that content on hard drives, with terms of use that limit the text mining that can be done. Developing large-scale open access collections as an alternative to proprietary databases is a challenging and expensive activity. As Andrew Prescott notes, *The Proceedings of the Old Bailey Online, 1674–1913* required funding from four separate agencies and three different universities, and involved a team of twenty-two people, an infrastructure that “has more in common with filmmaking than old-style academic publishing.”[22] In the absence of sufficient public funding, an alternative is to partner with commercial vendors as Harvard Law School Library has with Ravel Law to digitize US case law. This project will make some forty million pages of material freely available, but the bulk access required for computational analysis will be restricted for the eight years by the exclusive commercial license granted to Ravel.[23] The challenges of digitizing manuscript rather than printed sources are even greater; as Putnam notes, “the utter idiosyncrasy of manuscript forms in which relevant data is preserved means that no digital magic wand is in the offering.” Take the early modern court archives described by Sharon Howard, for example, in which “Documents can vary hugely in size, structure, handwriting, materials and condition, defying any ‘one size fits all’ approach to digitising. They are frequently written in heavily abbreviated Latin, or legalised English, or an unholy mix of both. They are rarely indexed in any detail.”[24] These restrictions on access and digitization help narrow ↳ the scope of computational legal studies; in the USA, it has contributed to a focus on the US Supreme Court and federal appellate courts.[25]

5.3 Text Mining

The computational analysis of textual data—words—in digitized documents is a subfield of data mining known as text mining. These tools decompose texts into “measurable features that can be subjected to quantitative analysis.”[26] Creating data in this way requires humanities scholars to engage with evidence in ways different from their typical practices. Where, to use Miriam Posner’s words, we usually immerse ourselves in sources, dive in, and understand them from within, to create data is to extract information and features from sources, requiring the decomposition of a subject or object into attributes and variables.[27] Diverse sources do not fall straightforwardly into categories; they frequently require normalization. Data is then simplified (reduced to a model) for analysis. If humanities scholars chafe at such simplification, it is worth noting that narrative, the favored representational model of humanities scholars, is a deliberately simplified account that is illuminating because of, not despite, its simplifications. While computational tools can identify patterns through correlation, resemblance, or proximity, they cannot explain those patterns. A close readings of the sources to which the tools direct attention is necessary in order to generate interpretations.[28]

The simplest form of text mining discards word order to count the frequency of words in a corpus of documents. Those algorithms most obviously differ from search in that their results include every word, rather than only those that a researcher selects. The initial step involves identifying what will be counted. “A computer doesn’t know what a word is and certainly has no sense of what words might refer to,” as Stefan Sinclair and Geoffrey Rockwell note. “A computer ‘reads’—processes—text as a meaningless string of characters.” To demarcate words, computational tools look for spaces and punctuation, a process called tokenization.[29] Counting how frequently words appear provides an overview, a way of approaching texts without preconceptions and seeing what search might be missing, as well as creating a context for results

for term searches. Legal sources such as statutes, court records, trials, and judicial opinions are amenable to
p. 94 this form of computational analysis as they were published frequently, survive in comprehensive ↳
collections, and have a broadly consistent form that allows them to be compared over time. However, they are not always rich sources. As Sharon Howard notes, many English crime history sources before 1733 are in Latin and heavily formulaic, while nineteenth-century sources are often registers in quite complex tabular formats.[30]

In an article titled "*The Old Bailey Proceedings, 1674–1913*: Text Mining for Evidence of Court Behavior," Tim Hitchcock and William Turkel used computational text analysis to reassess the character of *The Proceedings of the Old Bailey* as a source. They questioned the validity of a narrative of change in court practice derived from statistical sampling and selected close reading. Comprehensively counting words and charting trial lengths and guilty pleas and verdicts for the whole corpus revealed that the *Old Bailey Proceedings* after 1800 "represent a much more accurate reflection of courtroom practice and behavior than was the case in the preceding century." That finding calls into question arguments that the major moments of transition in the evolution of the trial occurred in the last quarter of the eighteenth century, when the *Proceedings* cannot be relied upon as a source. Instead, computational text analysis uncovered a "dramatic evolution of court practice between 1800 and 1860" due to the rise of plea bargaining and a declining number of trials. The project thus used computational text analysis to reperiodize British legal history.[31]

What is counted in text mining can be refined to reveal more specific patterns in texts, to analyze the elements of legal proceedings, for example. Tonja Jacobi and Matthew Sag's recent study of oral arguments in the US Supreme Court, for example, created a textual dataset from the Oyez multimedia archive which contained " 'chunks' of text and associated metadata indicating the name of the case, who was speaking, and the time-stamps for the beginning and end of that chunk of text." In addition, the court stenographers "identify questions with a question-mark and interruptions with the use of two dashes (— —) at the end of a speech episode." Counting these elements reveal that "justices in the modern era interrupt more, speak more, and leave far less time for the advocates to present their case." In addition, the text mining showed a significant increase in non-questions, which Jacobi and Sag argue indicate "that the justices are now arguing positions rather than querying advocates."[32]

Text mining can also be used to measure and compare the similarity of texts by counting the words and phrases they have in common. Given the importance of questions about precedent and influence to legal history, and the specialized and repetitive vocabulary used in legal sources and settings, computational tools that measure text reuse have obvious value to legal studies. Kellen Funk and Lincoln Mullen's "The Spine of American Law: Digital Text Analysis and U.S. Legal Practice" offers an exemplary example of this
p. 95 approach. They use text mining to trace the spread of the code of civil ↳ procedure known as the Field Code
to thirty-one American states and territories in the second half of the nineteenth century. The 222 relevant laws amounted to 50,000 pages containing about 180,000 regulations. Processing those documents for text mining involved splitting each section of the code into its own text file. That processing, a necessary organizing scheme for text mining, aligns well with legal discourse. Whatever way they were organized, codes were divided into specific regulations, which were the units that legislators borrowed. Funk and Mullen then compared each section to every other section and measured the similarity between them "by dividing texts up into tokens of consecutive words (called n-grams) and calculating a Jaccard similarity score, defined as the ratio of the number of tokens that the two documents have in common to the total number of tokens that appear in both documents." The resulting matrix containing the similarity scores for each possible pair of sections revealed about 106,000 borrowings from a previous code.[33]

Funk and Mullen used a variety of methods to examine this computational evidence. Whereas Hitchcock and Turkel and Jacobi and Sag relied on graphs and scatter charts, they used network analysis, visualizations, and clustering to support different scales of analysis. "Aggregat[ing] the section-to-section borrowings into a summary of how many sections each code borrowed from each other code" showed connections from one code to another. New York appeared at the center of the resulting network graph, with regional networks around first-generation borrowers even more similar to the original borrower than New York. Charting the pattern of borrowing within each code revealed a further level of detail. In combination, those methods highlight the hundreds of individuals involved in the spread of the code, the modifications and adaptions, rather than wholesale borrowing that characterized the process, and that the normal course of codification was to entirely displace internal traditions. To examine small changes in the wording and substance of the law, Funk and Mullen used a technique called clustering to group sections based on their similarity without regard to which code they come from. Sorting those clusters chronologically made it possible to see patterns in how different elements of the law developed from jurisdiction to jurisdiction over time, rather than how the law of a particular jurisdiction developed. This clustering shows, for example, that while the Field Code expanded witness competency so it excluded only the insane and very young children, as the code migrated west, legislators added racial exclusions, with fifteen states and territories ultimately subverting Field's reforms to maintain their abhorrence of non-white testimony.

Text mining identifies patterns of words in texts; it does not capture the semantic relationships between those words, or consequently the concepts in texts. Corpus linguistics builds on text mining to elucidate meaning by examining syntactic and semantic structures larger than single words. The first element of that p. 96 approach involves building a corpus, a database of texts that document a language used in a particular time ↳ period, and sometimes in a particular domain of the culture, such as the law. To identify a range of meanings, the corpus is annotated with tags for parts of speech, and for the different modifying functions and relations that a word can have in different contexts. That tagging has generally been done manually, although machine learning algorithms are now available as an alternative. The corpus is analyzed by combining search and colocation to use context to establish the meaning of a word. The results of a search for a word or phrase are displayed as a list with a specific number of words surrounding each result. In addition to visually identifying patterns, analysis of that concordance involves identifying and counting colocates, words which tend to occur frequently in the vicinity of the search term. Calculating a mutual information score, the relative frequency of collocates compared to what one would expect if the words were randomly distributed, can further elucidate the significance of colocation.

In the United States, the application of corpus linguistics to the law has been centered on Brigham Young University Law School. Their recent release of COFEA (Corpus of Founding Era American English), featuring more than 143 million words of text written between 1760 and 1799 from a variety of sources, has focused attention on the potential of corpus linguistics to provide a firmer empirical basis for the interpretation of the US Constitution in terms of how it was understood at the time of its adoption.[34] Questions about what this approach reveals center on the assumption that the most frequently used meaning is the ordinary meaning of a word. Ethan Herenstein, for example, has argued that a word's frequency partially reflects the prevalence or newsworthiness of the underlying phenomenon that the term denotes rather than the ordinary meaning of the word.[35] If frequency does not resolve which of the variety of meanings found in a corpus is the ordinary meaning, then that decision falls to the researcher. If that is the case, corpus linguistics provides an enriched resource for developing hypothesis about a word's meaning but does not definitely establish meaning.

5.4 Topic Modeling

Computational text analysis tools also exist to uncover meaning. The most widely used in the humanities has been topic modeling. These algorithms capture semantic features by identifying clusters of words—topics—that are more likely to appear in proximity to each other. The algorithm divides the texts into as many topics as the user specifies to produce a model of the possible themes of the corpus. It is then "the task of the interpreter [researcher] to decide, through further investigation, whether a topic's meaning is overt, covert, or simply illusory": instead of themes, a topic might identify specific p. 97 ↳ historical events, notable stylistic features, or systematic transcription errors.[36] The work done by the algorithm is discovery not interpretation.

Topic modeling of legal decisions offers the possibility of identifying themes in legal records in terms other than the categories and classifications employed in the law. However, that more so than other texts, legal categories appear in the text itself, constrains that possibility. To take Carter, Brown, and Rahmani's example, "the taxonomical terminology of 'administrative law' or 'administrative matters' appears in the legal texts that form part of that area of law, whereas 'epistolary novel' or 'epistolary form' will likely not appear in the text of novels belonging to that genre." Nonetheless, topic modeling can reveal distinctions between legal categories and practice. A topic Carter et al. label administrative law, for example, does not contain all the subjects that are part of that area of the law, highlighting that for that Australian court the area of "administrative law," or control of government action, is "a practice of writing about 'government action in relation to immigration' that includes (and not as borrowed from a related taxonomical field) questions of government powers, administrative decisionmakers and process, and international agreements."[37]

Topic modeling can also be used to find legal content in non-legal sources, identifying and incorporating words that a researcher might not have used as search terms. Among the early humanities topic modeling projects are two focused on newspapers: Sharon Block's study of the *Pennsylvania Gazette* from 1728 to 1800 and Robert Nelson's work on the *Richmond Dispatch* from 1860 to 1865. Both generated models with forty topics that included a topic related to the law. Block's topic, which she labeled "crime," featured as the most likely words "court person justice committed goal trial jury taken found called against brought murder prisoner."[38] The most likely words in Nelson's topic, which he labeled court proceedings, have some overlap with Block's topic, but include a number of words highlighting differences between eighteenth-century Pennsylvania and Virginia in the years of the Civil War: "court yesterday mayor charged arrested case slave charge stealing john committed judge trial examination ordered prisoner police morning discharged parties stolen found continued jury."[39]

For scholars employing quantitative methods, topic modeling offers a less subjective and faster alternative to hand-coding cases to create data about their meaning for statistical analysis. For example, Livermore, Riddell, and Rockmore used topic modeling to compare the semantic content of Supreme Court decisions, appellate court decisions, and appellate court cases chosen for review. They found that Supreme Court has become p. 98 ↳ semantically more idiosyncratic in recent decades, so that it is "easier today than in 1950 to distinguish a Supreme Court decision from an appellate opinion written in the same year based on the words in that opinion." Analyzing the cases that the courts write about showed they have not become more different; rather the Supreme Court has become more distinct from other federal courts in how it analyzes and discusses the legal issues before it.[40]

5.5 Spatial Analysis

Text mining can also be used to extract spatial data for analysis. The most common method is to use lists of entities either generated by machine learning or created by researchers to detect nouns and classify them, including as locations. Humanities scholars' use of these computational tools to explore newspapers is suggestive of how they could be used with legal sources. Cameron Blevins, for example, examined the frequency of place names in newspapers from nineteenth-century Texas, paying particular attention to the places beyond the region in which the papers were published as an indication of the world view and imagined geography presented by those publications.[41] Another approach to generating spatial data is through encoding or marking up the text with tags that delineate different types of information, which typically involves a combination of manual and computational processes that structure the information. The markup of the *Proceedings of the Old Bailey*, for example, included defendant's location and crime location which allowed the accounts to be mapped as part of the Locating London Lives project. However, that data suffers from a number of limitations beyond the problem of different names for the same place that exists for all text mined spatial data. Location information was encoded only if it appeared in the first two paragraphs of the trial account, so the data omits incidental spatial information contained in the rest of the account. Clerks also often recorded the crime's location as the defendant's location, distorting the data.[42] In the case of manuscript records, spatial data likely needs to be extracted manually, as was the case with the magistrate court records and district attorney's case files used in Digital Harlem to map incidents of crimes in a New York City neighborhood in the 1920s.[43]

p. 99 However it is created, spatial data needs to be mapped, to be visualized to be effectively analyzed and communicated. That is generally the case with the results of computational tools (as is well illustrated in the work of Funk and Mullen discussed in section 5.3). Geoparsing and georeferencing tools are available to transform place names and addresses into coordinates for mapping, effectively taking apart texts and reordering them in terms of the spatial information they contain. Spatial patterns that are hidden in texts and tables—often because they are so fragmentary or limited that humanities scholars treat them as ephemera—become visible on maps: patterns in where people, places, and events are located and the spatial relationships between different people, places, and events. Mapping the locations identified in newspapers, for example, makes obvious regional clusters that are not evident when locations are considered in isolation.[44] The interactive, iterative features of digital maps allow them to be explored in the same manner as the results of text analysis tools. Not only are mapped sources placed in their geographic contexts, but selections of those sources can be mapped, different layers of sources can be juxtaposed, and the scale can be zoomed from the level of individual buildings out to neighborhoods, cities, and regions.[45]

Tools for the spatial analysis of crime and the law have yet to be taken up to the same extent as text analysis. A wealth of scholarship that draws on the *Proceedings of the Old Bailey* scholarship relies on searching the accounts not mapping them. Everyday life, rather than crime, has been the focus of arguments made using Digital Harlem. There are no studies that look at published decisions in terms of locations they feature. Nicholas Terpstra's analysis of the legal regulation of prostitution in early modern Florence does offer one rich example. Using DECIMA, an online map of a sixteenth-century tax census, Terpstra analyzed the changing legislation, laws, and targets in terms of space and the senses to reveal "a conjunction of interests that we can miss if we look at legal or moral considerations alone." Mapping houses where prostitutes were registered, the streets where they were licensed to operate, and the shifting zones from which they were excluded, together with the residences of members of the chief magistracies and then the convents where those magistrates sent their daughters, he tracks three stages of regulation. First, fourteenth-century legislators sought to keep prostitution entirely outside the city walls. After those efforts failed, the authorities turned to using expulsions, a central brothel, and exclusion zones around particular buildings "to establish visual boundaries within which their wives and daughters would be spared the sight and

association of prostitution as they went about their daily lives.” A shift in the sixteenth century to smaller
zones and stricter prosecution of those who ventured out of the areas designated for prostitution reflected a
p. 100 change from concern with “visual boundaries ↳ protecting the peace of laywomen outside convents and
churches, to aural boundaries protecting the peace of religious women and men inside the convents and
monasteries.”[46]

Digital tools also allow for analysis of spatial dimensions of the legal process. Linked data projects like the Digital Panopticon, which uses names to connect forty different sets of judicial and civil records in order to tell fuller stories about individuals sentenced at the Old Bailey, are also implicitly tracing the movement of individuals between different institutions, across cities, and beyond them—and around the globe for convicts transported to Australia.[47] While it describes the criminal justice system as a process through which individuals journeyed, the Digital Panopticon does not map the experiences of individuals but instead visualizes them on a timeline, in the process missing an opportunity to consider the relationship of legal institutions to the places where crimes were committed and where defendants and victims lived.[48] Digital Harlem offers a glimpse of what such an analysis could reveal. The meaning of the law for blacks in interwar Harlem was shaped in part by its location outside their neighborhood. Arrest brought an individual to one of two police precincts, both near the boundaries of the black population; the magistrates and felony courts, probation and parole departments, court medical and psychiatric clinics, and prisons were all situated in white neighborhoods, and, in the case of prisons for those convicted of felonies, women, and juveniles, at a distance from the city.

Digital tools also provide a means of reconstructing and analyzing the interiors of legal institutions and how those spaces shaped what took place within them. Tim Hitchcock and his collaborators have modeled the Old Bailey courtroom in 3D to interrogate how the space worked, wrestling with competing evidence from surviving images and plans. This model provides a means of understanding the context of the words that appear in accounts of trials, closing some of the gap between the spoken and printed word. As redesigned in 1774, the Old Bailey courtroom differentiated the defendant, who was raised up and set back from the witnesses and victim, rather than having both victim and defendant stand before the bar in a situation that placed the two parties in a position of essential equivalence. The model also highlighted different levels in the courtroom, which required the lawyers to speak upward to the other parties to a case, creating the feel of a theater that demanded a performance. Analyzing the text of the trials in relation to this space highlighted a marked decline in the speech in trials, as plea bargaining expanded, and an apparent suppression of the defendant’s voice, with trials increasingly dominated by the voices of court officers.[49]

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5.6 Network Graphs

Non-spatial relationships between people, groups, or information can be visualized and measured using another computational tool, network graphs. These tools render the components of the network as nodes and the relationships between them as edges or links and allow multiple types of both nodes and edges. The resulting networks can describe which entities are most central to those relationships, or the density or degree of centralization of the whole network. Graphs can also be used to compare multiple networks, or contrast the state of a network at one point in time versus another. However, as network analysis assumes that the data represents a network, it cannot be used to argue that its subject is or is not a network.[50] The legal questions that have been most often posed as a network problem relate to precedent and citation. Network graphs offer an alternative to counting citations as a means to identify important cases. They are effective as descriptions, but less so as interpretations, a common problem in humanities applications of network graphs due to the limits of most common metrics in dealing with the complex multimodal networks associated with humanities questions.[51] The first legal network studies focused on the US Supreme Court, tracing the evolution of the reliance on precedent, and seeking to identify the centrality of different cases as precedents. Fowler and Jeon used a hub and authority algorithm to identify important cases: to provide a better measure than simply the number of citations to measure importance, the algorithm identifies hub cases that cite many other decisions and authority cases that are widely cited.[52]

Network graphs have not proved as useful for explaining why cases occupy the place they do in legal networks as they have for visualizing those networks. Exploring that question requires more complex networks that categorize different citation types, distinguishing those that provide authority or factually distinguish a case from a similar precedent and those in majority, concurring and dissenting opinions, weighing the strength of the relationships between nodes, and exploring how networks evolve over time.[53]

Network graphs have also been used to visualize relationships between people. Focusing on the law as a closed system, legal scholar Daniel Katz and his collaborators have constructed networks of hiring and placement to understand the nature of the American legal professoriate. They have also used networks of p. 102 shared law clerks as a ↳ proxy for relationships of social and professional esteem among judges.[54] By contrast, historian William Thomas III has analyzed freedom suits in early-nineteenth-century Washington, DC by tracing all the relationships contained in the legal records—not just legal, but also family, social, and occupational connections. The result is “web of litigants, jurists, attorneys, and community members” that highlights connections within and beyond the courtroom and across generations. Thomas’s work creates a new context for understanding petitions for freedom and the place of slavery in American society after the Revolution.[55]

The different approaches to using computational tools of Katz and his colleagues and Thomas highlight the capacity of digital tools to both take advantage of the nature of the law and legal sources to analyze the law on its own terms, as a closed system, and take apart texts to identify patterns and relationships that cut across the structures of the law, to “stir the archive,” to use Lauren Klein’s evocative phrase.[56] If addressing the limits of the use of search that has become a naturalized part of humanities research provides an impetus for humanities scholars to engage with computational tools, that engagement has broader implications for their research practices. As Roy Rosenzweig noted more than a decade ago, “one of the most vexing and interesting features of the digital era is the way it unsettles traditional arrangements and forces us to ask basic questions that have been there all along.”[57]

The computational dimensions of digital humanities raise epistemological questions about how to approach different questions and various kinds of sources, and what evidence is needed to support particular claims. Those questions need to be addressed whatever method humanities scholars use. Creating data requires an attention to the organization, structure, and description of archives and collections that is key to any analysis but is rarely elaborated in humanities scholarship. Similarly, computational analysis expands the scale of the analysis, "adding detail and context and systematically exploring claims about patterns such as what is typical and representative" and the periodization of historical discourses that raise questions about the selection and interpretation of the case studies common in humanities scholarship. Network graphs and maps visualize and measure relationships and spatial patterns in ways that capture a degree of complexity beyond what can be rendered in narrative. The significance of these digital methods is clearly not that they p. 103 are radical departures from the interpretative ↳ practices of analog humanities; rather, it stems from how they are deeply rooted in those practices, and in the digitized turn to full-text search that has already transformed them. It is not that all scholars must, or will inevitably, become practitioners of digital methods. The implication of digital humanities for all humanities scholars is that we must look anew at our practices of research and analysis and critically reevaluate the nature and scope of the interpretative claims that we make.[58]

Further Reading

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1 Mark Sample, "Building and Sharing (When You're Supposed to Be Teaching)," *Journal of Digital Humanities* 1 (2011), http://journalofdigitalhumanities.org/1/building-and-sharing-when-youre-supposed-to-be-teaching-by-mark-sample/

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https://books.google.com. For additional online primary sources, see the list on *Legal History on the Web,* https://law.duke.edu/legal_history/portal/primary-sources.html. For an older survey, see Morris Cohen, "Researching Legal History in the Digital Age," *Law Library Journal* 99 (2007): 377–393.

4 Ted Underwood, "Theorizing Research Practices We Forgot to Theorize Twenty Years Ago," *Representations* 127 (2014): 64–72, 65, https://doi.org/10.1525/rep.2014.127.1.64.

5 Susan Mart, "The Algorithm as a Human Artifact: Implications for Legal [Re]Search," *Law Library Journal* 109, no. 3 (2017): 387–422 398, https://scholar.law.colorado.edu/articles/755.

6 William Mills, "The Decline and Fall of the Dominant Paradigm: Trustworthiness of Case Reports in the Digital Age," *New York Law School Law Review* 53 (2009): 920–921, https://digitalcommons.nyls.edu/fac_articles_chapters/355.

7 Mart, "Algorithm as a Human Artifact."

8 Legal databases often call this type of search "a natural language search," but that term actually refers to searches constructed as questions, which rely on algorithms that use grammatical structures. "Keyword search" is a more appropriate label for this type of search, even though it incorporates multiple terms.

9 Casetext, "What a Difference a Few Years Makes: The Rapid Change of Legal Search Technology," *Casetext* (blog), March 7, 2018, https://blog.casetext.com/what-a-difference-a-few-years-makes-the-rapid-change-of-legal-search-technology-ce91a60ab73b; Mart, "Algorithm as a Human Artifact."

10 Underwood, "Theorizing Research Practices We Forgot to Theorize," 65.

11 Ibid., 64–65.

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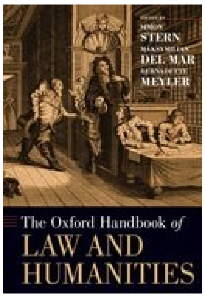

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CHAPTER

6 Postcolonial Legal Studies

Renisa Mawani

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Abstract

The emergence of postcolonial studies as a distinct field of inquiry has commonly been attributed to the work of Edward W. Said, particularly his groundbreaking book, *Orientalism*. Since the early 1980s, Said's insights have had a significant influence in the humanities, reshaping the fields of comparative literature, English, history, and anthropology. However, his arguments and interventions have held comparably less force in law and legal studies. Forty years after the publication of *Orientalism*, this chapter reconsiders to what extent Said's work—and postcolonial studies more generally—has influenced themes, debates, and directions in law and legal studies. To do so, this chapter borrows Said's three-part edifice—"The Scope of Orientalism"; "Orientalist Structures and Restructures"; and "Orientalism Now"—as a mode of organizing and as a method of reading the scholarship that falls under the sign of postcolonial legal studies and as a way to consider directions for further study.

Keywords: Edward Said, colonialism, imperialism, postcolonial legal studies, extraterritoriality, oceans, violence

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6.1 Introduction

> Orientalism … is not an airy European fantasy about the Orient, but a created body of theory and practice in which, for many generations, there has been a considerable material investment.
>
> — Said, *Orientalism*[1]

EDWARD Said has long been hailed as one of the founders of postcolonial studies. As Bill Ashcroft and Pal Ahluwalia explain, Said's influence is twofold: in his field-defining work, *Orientalism*, and in "his insistence on the importance of the 'worldliness' or material contexts of the text and the critic."[2] To be clear, Said was not the first to write critically of European colonialism and imperialism. Rather, his emphasis on text, discourse, and discursive regimes is what distinguishes his work from that of his predecessors, most notably the anticolonial writings of Frantz Fanon, Aimé Césaire, and other Caribbean and African writers.[3] Inspired by the archaeological methods of Michel Foucault, Said argues that any study of colonialism and imperialism must move from the economic and political to explore the deeply entangled relationships between knowledge, culture, and power.[4] "[W]ithout examining Orientalism as a discourse," he maintains, "one cannot possibly understand the enormously systematic discipline by which European culture was able p. 106 to manage—and even produce—the Orient politically, ↳ sociologically, militarily, ideologically, scientifically, and imaginatively during the post-Enlightenment period."[5] The discursive structures that connected East to West, and placed them in an asymmetrical relation, engendered theories and practices of rule that ultimately facilitated and justified European expansion and control over much of the earth. Knowledge and culture, Said argues, have been a vital though often overlooked register of imperial dominance.

Despite Said's influence on the emergence of a new field, the term "postcolonialism" does not ever appear in *Orientalism*. Rather, Said wrote passionately and incisively of the knowledge regimes produced through French, British, and American imperialism. The term "postcolonial" was devised later and in retrospect, referring to new methods and approaches to analyzing European empires, ones that were shaped by the rising popularity of French poststructuralism at the time, and its growing influence over Marxism. Since the late 1990s, as postcolonial studies has expanded and matured, it has encompassed a range of geographical regions, historical periods, and theoretical orientations. For some, postcolonialism signals a specific mode of critique, emerging out of literary theory and inaugurated by Said's *Orientalism*. For others, "the postcolonial" is a historical time frame that marks the formal independence of European colonies and territories.[6] As Bill Ashcroft, Gareth Griffiths, and Helen Tiffin define it, postcolonialism is "based in the 'historical fact' of European colonialism, and the diverse material effects to which this phenomenon gave rise."[7] Even this seemingly straightforward characterization, critics note, can be vague, vacuous, and unevenly applied. Postcolonialism in its early incarnations was most often extended to Africa and Asia, but not North America, Latin America, or the British Commonwealth.[8] The term's broad sweep, Upendra Baxi cautions, potentially flattens and even obfuscates the variegated histories and experiences of colonial subjects and European empires.[9] Yet, for some legal scholars, it is precisely this expansiveness that renders the postcolonial to be conceptually useful. Peter Fitzpatrick and Eve Darian-Smith note that the term's capaciousness brings into sharp focus a range of geographical, religious, and political concerns around p. 107 "alterity and identity … community and globalism," including "racism's new protean forms."[10] It is in ↳ these shifting global configurations and developments, they claim, that law and legal orders must be situated and analyzed.

Said's *Orientalism*, and postcolonial studies more generally, has been visibly influential in a number of disciplines, most notably anthropology, English, comparative literature, and history. In comparison, its analytic effects have only recently been palpable in law and legal studies. Although British imperial law operated in violent and discursive registers, producing epistemic, institutional, and physical structures of racial and political power across a wide and variegated geography, legal scholars have not always drawn inspiration from the field of postcolonial studies. According to Teemu Ruskola, "[T]he study of specifically *legal* forms of orientalism [still] remains largely unexplored."[11] And perhaps with good reason. Critics argue that Said's *Orientalism,* and postcolonial studies more broadly, characterizes colonial and imperial power as top-down, monolithic, and one-dimensional. As such, it may not be useful in engendering fine-grained analyses of struggles over and against colonial and imperial rule. Others claim that the "post" of postcolonial suggests the end of colonial occupation, which is not the case for many Indigenous communities.[12] Given the material force of law, especially the violent and ongoing subjection of Indigenous peoples and (formerly) colonial subjects globally, others have questioned whether Said's method of critique—with its emphasis on textuality, power, and knowledge—can be readily applied to studies of law and empire. Jeannine Purdy argues that covering "law in the borrowed garb of postcolonialism has made us blind to the ways in which law continues to function as it always has in the colonial context where police use their rifle butts" as pure force.[13] Postcolonial studies, others suggest, might benefit from a deeper analysis of law and sovereign violence, including the ways Occidental law has been marshaled to colonize non-European territories and subjectivities.[14]

Forty years after the publication of *Orientalism*, this chapter reopens the question of whether and to what extent Said's work—and postcolonial studies more generally—has influenced themes, debates, and directions in law and legal studies. To do so, I borrow Said's three-part edifice—"The Scope of Orientalism"; "Orientalist Structures and Restructures"; and "Orientalism Now"—as a mode of organizing and as a method of reading the wide-ranging scholarship that now falls under the sign of postcolonial legal studies. But before I begin, a few points of clarification are necessary. First, Said's *Orientalism* has a sweeping reach that covers British, French, and US imperialism. This chapter, by contrast, is far less ambitious. It centers primarily on the British Empire, though I draw selectively from the US context to show p. 108 the historical overlaps and ↳ continuities between Anglo imperial regimes. Second, I employ Said's concepts throughout, yet my readings of them do not always stay true to his invocations or his historical periodizations. Instead, I use the tripartite organizational structure in *Orientalism* as a way to reflect on Said's contributions to postcolonial legal studies, to explore prominent themes and directions in the field, and to suggest ways we might extend, expand, and develop his prescient insights to our ongoing imperial present. Third, *Orientalism* has often been read and critiqued as a text on colonial discourse. Whereas Said's investigations into the discursive regimes of Orient and Occident inspired and shaped the first wave of legal scholarship on European empires, critical engagements with his work have generated additional concepts, ideas and arguments that extend well beyond his writings. For example, legal scholars, myself included, have (re)turned to questions of law and violence to trace continuities between the past and present.[15] Finally, and perhaps most importantly, Said is a deeply materialist thinker. His concerns have centered on the production of knowledge just as they have focused on the use of force. His insistence on power, knowledge, and the " 'worldliness' … of the text and the critic" remain vital to studies of law and empire today, reminding us that text/context, representation/materiality, and discourse/violence are not easily divisible.[16]

6.2 The Scope of Orientalism

> There are Westerners, and there are Orientals. The former dominate; the later must be dominated.
> …
>
> —Said, *Orientalism*[17]

One of the primary contributions of *Orientalism* is Said's close and detailed analysis of French, British, and American textual production of the so-called Orient. Reading across the genres of literature, travel writing, and philosophy, he traces the ways in which the Orient was produced and subjected as an object of Western knowledge. The East/West divide, Said explains, did not refer to a natural, physical, or geographical distinction. It was historically created and reinscribed through the fictional and nonfictional works of European writers, scholars, and administrators. "The boundary notion of East and West, the varying degrees of projected inferiority and strength, the range of work done, the kinds of characteristic features p. 109 ascribed to the Orient: all these testify to ↳ a willed imaginative and geographic division made between East and West, and lived through during many centuries," Said writes.[18] Although East and West have long been arranged as distinct entities, European power and the colonial encounters it made possible changed the scope, meaning, and significance of this division. "The period of immense advance in the institutions and content of Orientalism," Said argues, "coincides exactly with the period of unparalleled European expansion; from 1815 to 1914 European direct colonial domination expanded from about 35 percent of the earth's surface to about 85 percent of it."[19] During this period of massive territorial appropriation and occupation, Orientalism shifted from "a scholarly discourse to an imperial institution," he writes.[20] To be sure, law featured prominently in the voracious and violent geographical ambitions of the British Empire and laid the groundwork for the development of imperial institutions. Some of the orientalist writers that Said analyzes—including Sir William Jones, a philologist, *puisine* judge in the Supreme Court of Bengal, and the founder of the Asiatic Society—were jurists and legal scholars.[21] But there were many others, as I discuss in section 6.3.

The first wave of postcolonial legal scholars have drawn from Said's formulations to examine how the discursive relations between East and West, Orient and Occident influenced the symbolic and material registers of Occidental law. To be clear, Said did not write of law directly. However, legal scholars have extended his insights to examine the cultural and symbolic dimensions of colonial and imperial legalities in national and international orders. Law was not merely a set of rules, signs, or an instrument of control. For some, it was also a "potent mechanism" and a knowledge-producing regime that was used to extract and compile information on colonial territories and populations, thereby creating "taxonomic states."[22] Imperial and colonial laws operated through illusory visions and projected ideals. Though their effects did not always produce intended or desired results, they were informed by political imaginaries that were premised on the presumed superiority of British legal culture.[23] The knowledge regimes generated by colonial and imperial laws grew out of patterns of racial management and became central to institutions and processes of legal enforcement in colonial and metropolitan regions. These discursive regimes carried serious material consequences for Indigenous and colonial populations, ones that remain central to political struggles over land, resources, and nationhood today.[24]

In his path breaking work, *Modernism and the Grounds of Law*, Peter Fitzpatrick draws on Said's method to p. 110 re-read British and French thinkers who form the European ↳ canon on law and political sovereignty. These include Hobbes, Locke, Blackstone, Rousseau, and others.[25] The geographical and political distinction between East and West, he contends, was only amplified through prevailing assumptions about race, culture, and law. Whereas Europe had law, non-Europe presumably did not. The mythology of modern Occidental law, as evidence of progress, civilization, and order, Fitzpatrick argues, was produced against the "savage" Orient as its antithesis. As Europe expanded its reach to the Americas, he elaborates, Occidental law—as a sign and symbol of civilization—became "a prime justification and instrument of imperialism."[26] For Hobbes and Locke, the "savage" had no conception of property, dominion, or law.[27] Thus, it was the white man's burden to bestow law and order as a "gift" of reason and rationality onto Indigenous and colonial populations. Under Occidental law, Fitzpatrick writes, "[t]he colonized are relegated to a timeless past without a dynamic, to a 'stage' of progression from which they are at best remotely redeemable and only if they are brought into History by the active principle embodied in the European."[28] It was through this myth of civilization and progress that "the European created the native and the native law and custom against which its own identity and law continued to be created."[29] The line between East and West, European and Native sanctioned British territorial expansion through the legal violence of imperialism.[30]

If Fitzpatrick's geographical and analytic frame centers on the Americas or the so-called New World, others have shared Said's interests in the Orient as both the near and far East. Samera Esmeir, for instance, draws on postcolonial and anticolonial thinkers, including Said, to trace the ways in which modern European law was used in the colonization of Egypt. "Modern positive law," she argues, "colonized Egyptians by turning their humanity into law's own teleology."[31] The force of colonial law, Esmeir argues, is not only evidenced in territorial expansion and conquest but also in the *invention* of the human and in the *destruction* of traditions, histories, and peoples.[32] Engaging with *Orientalism* directly, Teemu Ruskola extends the scope and genre of the Orient in Said's analysis, from Egypt and India to China, and from literature to legality. The Orient and Occident, Ruskola contends, "have [also] been produced through discourses of law."[33] In the British and later American imagination, China was routinely viewed as a space of lawlessness, excess, and despotism. “Legal Orientalism,” as Ruskola defines it, is “a set of interlocking narratives about what is and is not law, and who are and are not its proper subjects.”[34] In China, as in Egypt and the Americas, characterizations of lawlessness served particular political objectives at specific historical moments. First, p. 111 they established the presumed inferiority of China on a global stage. Second and relatedly, they ↳ enabled British and American authorities to enact new and innovative forms of legal control. Extraterritorial jurisdiction, for instance, allowed Britain and the US to protect their citizens and subjects from the seemingly barbaric laws of China. This maintained trade relations between East and West, Orient and Occident while further extending Anglo-imperial jurisdictional control. I return to extraterritorial jurisdiction further on. For now, it is important to remember that European expansion not only divided the globe into lawful and lawless regions, but also created contests and conditions for an emerging international order.[35]

Antony Anghie draws skillfully on the work of Said and other postcolonial thinkers to argue that international law is not a European invention as is often assumed. What we now call international law emerged from Europe’s violent interventions and occupations in the colonies. The production and expansion of a global legal order, he contends, was informed by shifting and contested regimes of knowledge. From the sixteenth to eighteenth centuries, naturalism—which located law in the domain of nature—was most prevalent. By the early nineteenth century, with the growing import of science and the scientific method, positivism came to dominate the field of international law.[36] Drawing from positivist idioms and ideas, jurists of the day divided the world into those who had law and those who did not. Importantly, as Anghie points out, these efforts to carve up the globe produced a “gap, understood principally in terms of cultural differences, between the civilized European and uncivilized non-European world.”[37] By establishing this separation, jurists associated sovereignty with Europe and the West. They “proceeded to devise a series of techniques for bridging this gap,” including methods “of civilizing the uncivilized.”[38] But colonial subjects posed serious legal and political challenges to European powers. How were Indigenous and colonized peoples to be legally dispossessed from their lands? How were they to be ruled and through which law?[39] For Anghie, the colonial order was crucial to the development of an international one: “It was only because of colonialism that international law became universal; and the dynamic of difference, the civilising mission, that produced this result, continues into the present.” Distinctions between East and West as barbaric/civilized and lawless/lawful continue to persist today, Anghie argues, most notably in the war against terrorism.[40]

Orientalism, for Said, “is knowledge of the Orient that places things Oriental in class, court, prison or manual for scrutiny, study, judgment, discipline, or governing.”[41] British law was crucial to the knowledge-producing apparatus of imperial and colonial expansion. As the Empire extended its territorial and legal influence, colonial and imperial administrators called for surveys and commissions to collect information p. 112 on far-off ↳ peoples and places. In Dominions, protectorates, and colonies, and especially in times of political and legal failings, British authorities routinely appointed commissions of inquiry to investigate past events and to offer future recommendations.[42] These commissions were knowledge-producing ventures that generated thousands of pages of testimony, evaluation, and commentary on events, peoples, and local conditions that traveled to the metropole and served as lessons in other colonial contexts. In short, legal knowledges were vital to the ambit of colonial and imperial rule. For John Strawson, colonial law became “an important site of imagery and representation” that granted legitimacy to “the metropolitan center as a center of the legal order.”[43] Thus, East/West, Orient/Occident, and European/Native were entangled in relational classification systems that were produced, reproduced, and reaffirmed in statute and jurisprudence, and often with far-reaching consequences, including repression, resistance, and death for Indigenous and colonial populations.

6.3 Orientalist Structures and Restructures

> Orientalism is after all a system for citing works and authors.
>
> — Said, *Orientalism*[44]

The discursive regimes of East and West were established historically through citation and repetition. In part two of *Orientalism*, Said traces the architecture of ideas that recurred and accrued in British and French writings. Orientalism, he observes, “embodies a systemic discipline of *accumulation*” which gathers humans and territories into a modern and evaluative order.[45] That British thinkers and administrators were reading and citing one another is how this mass of ideas was produced as common sense and as projected reality. “In the system of knowledge about the Orient,” Said writes, “the Orient is less a place than a *topos*, a set of references, a congeries of characteristics, that seems to have its origin in a quotation, or a fragment of a text, or a citation from someone’s work on the Orient, or some bit of previous imagining, or an amalgam of all these.”[46] This is not to suggest that orientalism was the same everywhere. In the British and French contexts, orientalism shifted differently in response to colonial populations, emerging institutions, and to p. 113 the scope, scale, and intensities of imperial control. ↳ Whereas the “room for imaginative play” in the British imaginary, Said posits, “was limited by the realities of administration, territorial legality, and executive power,” for France, by contrast, the Orient “was the Orient of memories.”[47]

Critics of *Orientalism* argue that Said’s characterizations of orient and occident are too homogeneous, uniform, and monolithic to account for the struggles against colonial and imperial control. Rather than tracing discontinuities across imperial regimes and historical periodizations, Said allegedly draws a direct and continuous line between orientalism as a precolonial formation and its subsequent versions, which he argues, were enfolded into imperial and colonial administration.[48] But Said’s formulations might be read in ways that are more attuned to the subtleties of his analysis. The “essential aspects of modern Orientalist theory and praxis (from which present day Orientalism derives),” he explains, “can be understood, not as a sudden access of objective knowledge about the Orient, but as a set of structures inherited from the past, secularized, redisposed, and reformed by such disciplines as philology, which in turn were naturalized, modernized, and laicized substitutes for (or visions of) Christian supernaturalism.”[49] The production of orientalist thought, as it emerged in the classical fields of philology and literature, eventually expanded into and shaped the modern disciplines of science, history, and law. The continuity that Said traces through these fields of knowledge and across historical periods does not imply that orientalism has ever been fixed or immutable. What it does suggest is its ever-changing persistence. The specific qualities and characterizations of East and West may well have shifted, but its underlying regimes of power/knowledge continue to divide the earth in ways that maintain the ostensible superiority of the Occident over the presumed inferiority of the Orient, even today.

In Said’s account, discursive regimes were crucial to laying the groundwork for colonial and imperial administration and its use of force. Through the corpus of European textual production, including literature and travel narratives, British and French administrators encountered “the Orient” long before they ever left the shores of Europe. The imaginations and fantasies that permeated and preoccupied European thought, Said argues, prepared “the way for what armies, administrators, and bureaucracies would later do on the ground.”[50] Said directs his critical attention to the writings of Sacy, Renan, and Marx. More recently, political theorists and legal scholars have extended his methods of tracing the persistence of colonial thinking in the work of classical and canonical writings produced by eighteenth- and nineteenth-century British jurists.[51] Some of these European thinkers wrote passionately and extensively of India, a place they p. 114 had ↳ never seen firsthand. Whereas Marx penned thirty-three articles on India for the *New York Tribune*, James Mill’s *The History of British India* became *the* definitive text on the British Raj.[52] “James Mill never visited India,” Uday Mehta observes, yet “he wrote a monumental six-volume history of India. He also worked for several years as the chief examiner of Indian dispatches in the East India Company in London, a job J.S. Mill [his son] held for 35 years."[53] In *The History of British India*, Mill presented a detailed account of what he believed to be Indian culture, religion, and custom. His portrayals were elucidated through thick description and further refined in the racial comparisons he drew between India, China, Persia, and Britain. "Comparativism," Said reminds us, was "rarely descriptive" and always "evaluative and expository."[54] In the case of Mill, his writings established India's putative inscrutability and its presumed inferiority. This was not just a set of ideas. *The History* became mandatory reading for officers of the East India Company and a required textbook for senior administrators in the Indian Civil Service.[55] Ultimately, Mill's representations of India provided a primer, rationale, and justification for the British Raj.

In *Orientalism*, Said briefly acknowledges the influence of Foucault's archaeological method. Yet, he departs from this approach in important ways. Unlike Foucault, Said views the relationship between author, text, and context to be a critical one.[56] Texts and their authors operate "not only in the parameters of meaning," but also "within a politico-historical field," he contends.[57] Said's emphasis on the "worldliness" of texts is vital to literature and travel writing and equally significant to law. The British Empire is commonly described to be a vast bureaucracy and an empire of paper. Yet, as Keally McBride argues, its legal apparatus was envisioned and overseen by a very small number of British men. In her recent book, *Mr. Mothercountry*, McBride describes Britain's rule of law as "a project of a particular set of personalities."[58] Her interest centers on one figure in particular, James Fitzjames Stephen, an abolitionist, opponent of British colonialism, and a critic of John Stuart Mill. According to McBride, Stephen was "driven by a personal mission to use law to create opportunities for the dispossessed persons under British Rule."[59] Stephen worked in the colonial bureaucracy from 1813 to 1847 and was the undersecretary of the colonies for almost thirty years. During this time, he supervised the legal administration of the British Empire as it stretched from Canada to Jamaica and Sierra Leone to India.[60] Contrary to conventional views, McBride argues, the British did not rule their empire solely through paper or at a distance. Rather, the dispositions and beliefs of British administrators profoundly shaped and influenced how colonial laws and imperial policies developed, p. 115 where they circulated, and to what extent they ↳ were adopted, bringing together distant regions under imperial control. In the case of Stephen, the "business of empire was conducted with maps, letters, and most of all—*personal accumulated knowledge.*"[61]

British jurists, including Stephen, may have produced and projected particular legal and political orders, but imperial expansion and control was regularly confronted by a number of "colonial problems" on the ground. These included Indigenous resistance, settler violence, the persistence of religious and personal laws, distinct languages, different customs, as well as multiple claims to jurisdiction and sovereignty.[62] As British rule expanded territorially, what counted as law often shifted course. The growing "circulation of British economic interests, citizens, and rapidly accelerating international competition over resources and territories," McBride suggests, "combined to create pressure on the traditional understanding of the rule of law."[63] By the mid-nineteenth century, colonial administrators regularly traveled between Britain's Dominions, colonies, and territories, sharing their impressions of colonial populations and their strategies for legal and political governance. These agendas and programs were not imposed or transplanted from one place to another. They were translated and negotiated, sometimes in consultation with Indigenous rulers, and often in collaboration with imperial authorities in metropolitan regions.[64] It was in these negotiations, confrontations, and struggles that the scope and meanings of law—including its limits and possibilities—were worked out, sometimes diplomatically and other times violently.

In the scholarship on law and empire, we might rethink Said's "Oriental Structures and Restructures" not as discursive frames but as *infrastructures* that made colonial occupation possible and durable. Jurists and administrators drew on shared repertoires of law and legal knowledges to govern foreign places and populations. The archival and citational practices of law produced a mobile legal apparatus that facilitated the movements of some people, goods, and ideas, while ensuring the containment and fixity of others.[65]

These movements and circulations were dependent on discursive and material infrastructures. Shipping regulations, systems of credit and debt, international treaties, customs regulations, and immigration restrictions, which were central to the development and expansion of global capitalism, engendered mobilities in particular directions and not others. As Achille Mbembe observes, strategies of European imperial control “involved certain key technologies (the gunboat, quinine, steamship lines, submarine p. 116 telegraph cables, and colonial railroads).”[66] These technologies established sea-bound ↳ and overland routes of territorial expansion, spatial dominance, and racial terror. Legal experimentations across the uneven and unruly topographies of imperial control legitimized certain trade and migration patterns, while foreclosing others. Maritime laws determined where and when ships could travel, whom they would employ, and what they could transport.[67] Port cities became key nodal points that made the transit of people and the transport of commodities—including knowledge regimes—possible. These watery regions were not pristine or lawless; they were fluid spaces saturated by plural and competing legalities.[68]

The colonial legal infrastructures that were established at the high mark of the British Empire may have shifted, expanded, and mutated. However, they inform and shape our imperial present in palpable ways. Territorial struggles over pipelines that crosscut national borders and connect inland regions, rivers, and ocean spaces continue to be challenged by Indigenous peoples and their supporters across North America.[69] Somali fishers, thought to be “pirates,” are disputing the jurisdictional claims of European and foreign ships encroaching and overfishing in their coastal waters.[70] These ongoing legal and political conflicts over national, international, and ultimately imperial jurisdictions may be one way to extend Said’s insights on knowledge, power, and territorial control.

6.4 Orientalism Now

> Geography was essentially the material underpinning for knowledge about the Orient.
>
> — Said, *Orientalism*[71]

Perhaps the clearest path to “Orientalism Now,” and the most obvious way to bring Said’s insights to bear on the contemporary moment, is by expanding his trenchant critique of Islamophobia. In the third and final part of *Orientalism,* Said directs his attention to the vilification of Islam in eighteenth- and nineteenth-century orientalist thought. “Given its special relationship to both Christianity and Judaism,” he writes, “Islam remained forever the Orientalist’s idea (or type) of *original* cultural effrontery, aggravated naturally p. 117 by ↳ the fear that Islamic civilization originally (as well as contemporaneously) continued to stand somehow opposed to the Christian West.”[72] Whereas the occident, in British and French writings, was thought to value liberty, equality, and self-expression, the “Islamic Orient” ostensibly did not. In Britain, France, and more recently the USA, Said argues, the Arab and/as Muslim has been caricatured in popular culture as a “[s]lave trader, camel driver, colorful scoundrel,” and “behind all of these images is the menace of *jihad …* a fear that the Muslim (or Arabs) will take over the world.”[73] From the 1970s onward, and accelerating in the past two decades, negative and violent portrayals of Islam have become pervasive, not only in the West, but also increasingly across the globe, as evidenced in India, for example.[74] Fears of *jihad* as terrorism have been mobilized to justify strategies of war at home and abroad, all under the auspices of protecting Western and democratic freedoms. These representations of Islam, which Said traces historically and into the twentieth century, continue to reinscribe the lines between lawless/lawful, Orient/Occident, and East/West, albeit in new ways.

Following the 9/11 attacks on the World Trade Center and the Pentagon, which were met with the American invasion and occupation of Afghanistan and Iraq and a militarization of the US mainland, many scholars have expanded Said’s critique of “Islam as Orient” to critically examine these global developments, including the discursive logics and rationales that underpin them.[75] Feminist legal scholars have argued that attacks on the Taliban and on Sadam Hussein's regime were informed by growing concerns of "Oriental despotism," as evidenced in human rights abuses, particularly against women and girls. To be clear, concerns of racial and gendered violence were not produced anew through American responses to 9/11. Rather, fears of Islamic terrorism only exacerbated them. Writing of Norway's legal and political responses to forced marriage, Sherene Razack argues that violence committed by Muslim men against Muslim women in Europe and North America is described entirely in cultural and racial terms. Muslim women are "imperiled," and the only means of protecting them from the violence of seemingly despotic men is through immigration controls and increased surveillance. The call to state and international initiatives aimed at protecting Muslim women from Muslim men are underscored by recurring colonial tropes of "Oriental" cultures.[76] "Almost without exception," Said reminds us, "every contemporary work of Orientalist scholarship (especially in the social sciences) has a great deal to say about the family, its male dominated structure, its all-pervasive influence in the society."[77] Historically, British administrators drew on fears of cultural violence to initiate campaigns to p. 118 ↳ safeguard Indian women and girls (mostly but not only upper class Hindus) from the seemingly barbaric cultural practice of *sati,* to which they were believed to be subject.[78] Today, allegations of gendered violence in Muslim communities animate and amplify Islamophobia and racism, globally.

Said's emphasis on Islam, as crucial as it is, has left other enduring effects of "Orientalism Now" unremarked and unproblematized. As discursive regimes and geographical orders, distinctions between East/West and Orient/Occident continue to organize the planetary order in fundamental ways. Although space and geography provide material ballast to Said's arguments on power/knowledge, his conception of space is surprisingly limited. In particular, Said pays little attention to oceans, especially their vital role in histories of European imperial expansion and colonial conquest. Like so many of his contemporaries, Said's entry point to the British, French, and American Empires centers entirely on terra firma. In *Culture and Imperialism*, he makes his point explicitly: "At some very basic level, imperialism means thinking about, settling on, controlling land that you do not possess, that is distant, that is lived on and owned by others."[79] Given his early interests in Joseph Conrad, Said's geographical omissions are even more surprising. In his doctoral dissertation, *Joseph Conrad and the Fiction of Autobiography*, which he completed in 1966 and was published posthumously in 2008, Said reads Conrad's novellas against the intimacies of an epistolary archive which detail his many travels and adventures at sea.[80] As a mariner turned literary figure, oceans, seas, and ships feature prominently throughout Conrad's writings and are central to how he represents the world. Indeed, Conrad was well aware that European imperialism and global capitalism would have been unthinkable and even impossible without the ships that crisscrossed ocean and riverine regions. For the seafarer, Conrad noted, the sea was "not [only] a navigable element, but an intimate companion."[81] After all, it was ships that carried settlers, slaves, migrant labor, plantation commodities, and law.[82]

To be sure, the sea invites different histories and alternative viewpoints of orientalism, law, and empire that also expand Said's insights. By the sixteenth century, as navigational technologies developed, allowing ships to move farther and farther from shore, the earth's aqueous regions were transformed into international spaces of so-called free trade. In his lectures on the "Birth of Biopolitics," Foucault observes that maritime law was at the center of "free trade" and global capitalism, and also at the heart of modern forms of governance. "The history of maritime law in the eighteenth century," Foucault explains "was an attempt to think of the world, or at least the sea, as a space of free competition, of free maritime circulation, and consequently as one of the necessary p. 119 ↳ conditions for the organization of a world market."[83] For many scholars, conceptions of the sea as a "space of free competition" emerged from the writings of Dutch jurist Hugo Grotius. In the early seventeenth century, the young lawyer was commissioned by the Dutch East India Company (VOC) to advise on a maritime dispute that took place in the Straits of Singapore. In 1609, Grotius published *Mare Liberum* or "Free Sea."[84] Here, he argued that the sea was a common space that was beyond the sovereign claims of imperial and national polities. European powers could not make proprietary claims to the high seas, he argued, but they could extend their jurisdictional control over aqueous regions through the movement of ships.[85] For Grotius, this jurisdictional mutability was an early expression of a fluid and aqueous international order.

Despite European myths of the freedom of the sea, Orientalism structured the land/sea divide in a number of ways. First, by portraying oceans as empty and lawless, European thinkers following Grotius erased the vital presence of Indigenous and Islamic maritime law.[86] Second, the land and sea divide was fundamentally shaped by racial and cultural distinctions established between East/West.[87] In European political philosophy, for example, Europe was closely associated with the sea whereas Non-Europe was represented through land. As the controversial Carl Schmitt explains it, "the Orient, is a contiguous mass of land-based countries," whereas "the Occident today is the hemisphere surrounded by the great oceans; the Atlantic and Pacific."[88] For Schmitt and others, the distinctions between Orient/Occident and land/sea in European thought were not solely geographical but inherently political and racial. Notwithstanding the significance of maritime worlds to Indigenous and non-European seafaring communities, Europe and the sea were viewed as "mutually constitutive, both evoking freedom and progress."[89] This distinction between land and sea may have evolved from a longer imperial past; however, it remains foundational to national and international law today. Struggles over freedom, mobility, and jurisdiction in the Mediterranean, South Pacific, and the South China Sea continue to be characterized as biopolitical struggles between East/West and Orient/Occident.[90]

Oceans, I am suggesting here, present not only a useful site but also a productive *method* for thinking about law, empire, and orientalism in ways that might extend the ↳ reach of Said's insights and of postcolonial legal studies.[91] Land and sea, for instance, invoke different histories and periodizations of extraterritoriality. For some legal scholars, extraterritoriality is a mid-nineteenth-century development. Recall that in McBride's account, extraterritoriality emerged out of legal, political, and economic concerns over the fragility and uncertainty of British imperial administration in Sierra Leone. The instability of colonial rule, she argues, engendered new legal innovations that strategically differentiated imperial governance from sovereignty and territorial control.[92] In 1843, and against the interests and advice of James Stephen, Britain passed the Foreign Jurisdiction Act. At a time of heightened mobility across the empire, the Act ensured that Britons would be subject to prosecution under British law, even when traveling and residing outside of Britain. This so-called legal protection became crucial in putatively lawless places such as Egypt and China.[93] Extraterritoriality enabled British and American authorities to extend their jurisdictional reach into China by ensuring the continued movements of its citizens and subjects and by facilitating trade without requiring territorial control.

Extraterritoriality has been described by some as the "deterritorialization of law" and by others as "colonialism without colonies," a scheme that enabled the British and American Empires to spread their geographical control through persons rather than spaces.[94] More recently, extraterritoriality has resurfaced as a key strategy in the American-led war on terror. As Nasser Hussain observes, the black sites of torture and detainment that have been in greater use since 9/11 have much lengthier histories that can be traced to British colonial policies. Guantanamo, he explains, "points to a long history of imperial powers carving out spaces of the globe not only for their military and geopolitical needs but also as depositories for their 'dangerous classes.' "[95] The US government established the base at Guantanamo in 1903, Hussain points out, at the same time they acquired jurisdiction over the Panama Canal Zone. "What is typically colonial about these arrangements," he observes, "is not that they claim a space beyond law" but rather, that they produce spaces that are themselves extraterritorial, situated "between laws, in the interstices of multiple legal orders."[96] Under the Obama government, black sites were extended into the sea. Instead of sending terrorist suspects to the base at Guantanamo, which Obama promised to close, his administration used warships on the high seas as sites of interrogation, torture, and detention. Ships at sea were in international waters, beyond the territorial sovereignty of any one country, and thus under the jurisdiction of the US

p. 121 flag.[97] The multiple legal orders of the sea and the fluidity of ↳ jurisdictional control that was marshaled by the Obama administration have deeper roots in European debates over the high seas as a "free space."

When viewed from oceans, extraterritoriality emerges not as a mid-nineteenth-century phenomenon but one that was established much earlier and as part of an imperial international order. In 1609, Grotius argued that European imperial powers, including the Dutch and Portuguese, could not claim sovereignty over the high seas but could extend their political and legal control over aqueous regions through shipping.[98] By the early nineteenth century, and in order to protect merchant ships from prosecution in foreign courts—a concern that echoed efforts to safeguard British and American citizens and subjects in China—the US Supreme Court ascribed legal personhood to ships.[99] Extraterritoriality expanded British and American control over the so-called free sea, by extending imperial jurisdiction not through territorial control over land but through one of empire's most vital moving parts: its vessels. Ultimately, by expanding Anglo imperial control over land *and* sea, extraterritoriality helped to produce an international order that supported European trade and commerce, while naturalizing East/West and Orient/Occident, the divisions that Said so vehemently challenged.

6.5 Conclusion

> Orientalism is more particularly valuable as a sign of European-Atlantic power over the Orient that it is a veridic discourse about the Orient.
>
> — Said, *Orientalism*[100]

Studies of law and empire have followed two distinct routes. The first, drawing from Said and postcolonial studies, has explored the ways in which colonial subjection and legal violence was advanced through shifting regimes of legality, to which power and knowledge were central.[101] The second has focused on struggles and patterns of imperial control. Whereas the former has generally been more theoretical in orientation, the latter has been more historically attentive, demonstrating the fragility and vulnerability of
p. 122 colonial power, the resilience and resourcefulness of colonial and Indigenous populations, ↳ and the fluidity and malleability of imperial sovereignty.[102] This bifurcation of the field, I suggest, is premised on a narrow reading of postcolonial studies, one that emphasizes textuality over materiality and violence. As the epigraph above makes clear and as I argue in this chapter, Said was not concerned with discourse and representation alone. Indeed, one of the primary contributions of *Orientalism* is its emphasis on the indivisibility of the discursive and material, and ultimately, the inseparability of representation and force.

In *A Search for Sovereignty*, Lauren Benton contends that binary distinctions "between Europe and extra-European legal zones gives us little to work with in describing or analyzing patterns of variation within and across European empires."[103] Although Benton's remarks are directed at conceptions of sovereignty in the writings of Carl Schmitt and Giorgio Agamben, she could very well be writing about Said's *Orientalism*. Remember that one of the primary critiques of Said's writings centers on his analytic framework, especially the Orient/Occident binary. To be sure, legal orders along land and sea were rarely smooth and never monolithic. They were layered, uneven, and deeply contested. However, these nuances and complexities do little to diminish the power and endurance of orientalism. Rather, these specificities demand that we examine the multiplicity and mutability of orientalism, a project that should feature prominently in postcolonial legal studies. Critics, including Benton, raise important questions regarding the limits and possibilities of social and political theory in shaping and guiding historiographical questions. The dualisms of East/West, Orient/Occident, and European/Savage may not be helpful in analyzing particular patterns of colonial and imperial control, but they remain vital to others. The discursive and material violence that was produced through European colonialism and imperialism historically continues to animate the present global order in old and new ways. These are most clearly evidenced in Indigenous and migrant contests over land and in migrant efforts to cross the sea. In our troubled present, Said's *Orientalism* remains as crucial today as it was when it was first published. The task of the present and future of postcolonial legal studies may be to reread and rework the critical and analytic possibilities that Said offered us more than forty years ago.

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4 Michel Foucault, *The Archaeology of Knowledge* (New York: Pantheon, 1972).

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6 Indigenous scholars have rightly questioned and criticized the postcolonial as a temporal periodization that marks the formal independence of colonies, dominions, and territories. Many argue that colonialism and territorial occupation remain ongoing in settler colonies, a crucial point that is ignored by temporal interpretations of the “post” in postcolonial. See, e.g., Jodi A. Byrd, *The Transit of Empire: Indigenous Critiques of Colonialism* (Minnesota: University of Minnesota Press, 2011). For a more general critique of postcolonial as a temporality, see Anne McClintock, *Imperial Leather: Race, Gender, and Sexuality in the Colonial Contest* (London: Routledge, 1995), especially the introduction.

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54 Said, *Orientalism*, 149.

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57 This quote is from Strawson's reading of Said. See Strawson, "Reflections on Edward Said," 365.

58 McBride, *Mr. Mothercountry*, 14.

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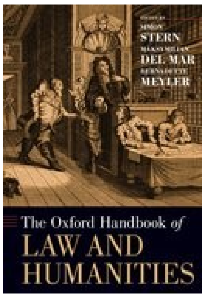

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CHAPTER

7 Racial Ambiguity Blues: Contemporary Challenges for Racialization Theory in the Twenty-First Century

Camille Gear Rich

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Abstract

This chapter explores contemporary accounts of racialization, arguing that Americans are currently experiencing a period of "racial ambiguity blues." The chapter explains that contemporary racial politics have been powerfully shaped by the emergence of a group of racially ambiguous characters offering controversial racial claims. The controversies triggered by these stories of racial ambiguity lay bare the fact that there currently are competing rules for determining an individual's race in American society and no single model or account of racialization controls. The chapter briefly lays out the three contemporary racialization models: "so-called" biological race, physical race, and performative race. It then identifies the material and political implications of each racialization model. After noting the challenges the competing racialization models pose for sociology, the chapter highlights ways aspects of the various racialization models can be integrated, offering as an example the author's account of "elective race." Additionally, the chapter points to the ways in which analytic approaches from the humanities can help social science scholars craft new analyses that better account for racial ambiguity and racial fluidity. The chapter closes by identifying four new challenges on the horizon for all scholars of racialization across field.

Keywords: racial identity, racial identification, biological race, multiracials, genetic race, racial project, racial formation, classification, physical race, performative race

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IN 2017, journalists in the United States converged on the body of Paris Jackson, the eighteen-year-old surviving daughter of pop icon Michael Jackson, in order to discover the racial "truth" of her body.[1] Jackson, a wealthy, visually striking heiress with olive-toned skin, hazel-green eyes, and blond hair, set off a firestorm when she proudly proclaimed to an interviewer at *Rolling Stone Magazine* that she identifies as black, just like her father. A racial frenzy and media circus promptly ensued.[2] With her statement of blackness, Paris Jackson became the perfect racial Rorschach Test for American society; she concretized otherwise amorphous disputes about the fluidity of race in the United States and the governing norms of contemporary racialization. For as we move into the twenty-first century, there are multiple swirling questions in America about the proper standard for ascertaining an individual's racial identity. Recent years have been marked by the emergence of racially ambiguous characters offering controversial racial claims. In this sense, Jackson's story is more than pop trivia; she provides us with a valuable opportunity to explore America's "racial ambiguity blues." These stories about racial ambiguous persons offer social scientists and other scholars the opportunity to explore open questions in the United States about the contemporary p. 126 dynamics of racialization. ↳ By working through these stories, Americans find space to explore their own racial tests and truths, and to honestly confront the competing rules for determining race in American society.

Currently there are three prevailing accounts of racialization in the United States; America's racial ambiguity blues stem from the fact that no single model enjoys clear dominance or supremacy. Indeed, these three accounts of racialization track key definitional debates about race in the field of sociology 'Biological" race is the controlling account for many Americans.[3] For this group proof of race can only be definitively established through review of a person's genes. Under this model, Jackson's racial identity can be determined by examining her DNA. For other Americans, physical race is their primary frame; bodily appearance is the only relevant resource for determining a person's racial identity. For these persons, Jackson must have physical features socially recognized as black in order to establish her claim that she is a "black" American.[4] Still other Americans take the position that a racial proclamation itself is sufficient to establish one's racial identity claim. This model, called performative race, posits that Jackson should be recognized as black because she took specific, concrete action intended to communicate or signify her adoption of a black identity. Some models of performative race specially credit an individual's voluntary, public affirmations of identity; challenges to these racial identity pronouncements are often seen as suspect, intrusive, and subordinating.[5] At present, all these accounts of racialization exist side by side in America, with no clear understanding about why we should prefer one model of racialization over the other. Consequently, stories like Paris Jackson's account trigger anxiety about precisely what race means. Scholars and laypersons alike wonder and worry about the material and political consequences of shifting from one racialization scheme to another.

Jackson's story, like other accounts of racial ambiguity, also lets us chart the increasingly porous divide between the humanities and social sciences in the field of racialization studies. Humanities scholars understand racialization studies as structured inquiries into the interpretative rules used to discipline a field of rebellious bodies, guided by the language of racial meaning.[6] Social scientists, by contrast, tend to characterize racialization studies as inquiries that examine institutional structures, economic factors, p. 127 political realities, and family dynamics to determine how individuals learn about, understand, ↳ and experience racial constructs in specific historical and geographical contexts.[7] Yet increasingly the study of race requires scholars in the social sciences to shift toward humanities-based analytic approaches and intellectual norms. Race has now become a site of multiple truths, competing and unfinished narratives, and it requires close reading of texts in conjunction with political and historical pressures.[8] Specifically, sociologists studying race now ask more macro-level questions that require acknowledgment of the operation of multiple racialization schemes. These inquiries include: How do bodies become raced in society? What are the rules that determine how bodies are assigned racial labels? How do these rules change over time and in response to political conditions?

Howard Omi's and Michael Winant's seminal book *Racial Formation*[9] was key to this shift, as it ushered in an era that placed greater emphasis on the power of language in shaping racial conflicts.[10] Although not stated in these precise terms, Omi and Winant argued that scholars studying race should map the prevailing discursive enterprise or racial project currently operating in society, and consider its relationship to particular historical events and political conflicts. They encouraged scholars to examine how racial meanings get reinterpreted and redeployed at a macro-level by institutions, and at a micro-level by individuals in the course of making sense of their lives.[11] The course of study Omi and Winant outlined tracks the charge many Foucauldian scholars follow in the humanities, as they explore the adoption and adaptation of language constructs, and the role interpretative structures play in enacting forms of power conferred on different institutional players. Yet racial formation theory does not anticipate or address our current "racial ambiguity blues." A new course of study is required to ascertain how people manufacture racial meaning when conflicting racialization schemes enjoy seemingly equal legitimacy and compete in open view. America is in a period of truth-telling about the contested nature of racial constructs and, as a result, institutions are being required to display greater precision and transparency when using race in institutional procedures. Scholarship must evolve as well.

This chapter treats the trials and tribulations of Paris Jackson as an opportunity to lay out three prevailing modes of racialization in the United States as documented in the social sciences. The chapter briefly defines the various approaches and examines their historical origins and their contemporary material and political consequences. It also explores newly emerging models, like elective race, that integrate aspects of competing racialization approaches.[12] The chapter concludes with some observations about the challenges p. 128 racialization scholars will face in the decades to come, noting how analytic ↳ approaches associated with the humanities may play a role in managing these challenges. For as we move into the next era of scholarship on race, we require new tools to address claims of racial agency, issues of racial ambiguity, and the appropriate bounds of racial questioning. If we are to find a way out of the "racial ambiguity blues," we must find ways of discussing the multiple truths Americans hold about ourselves and others when we talk about race.

7.1 Contemporary Approaches to Racialization

7.1.1 Biological Race

What is race? For some portion of America, race is regarded as a genetically determined biological fact.[13] Under this approach, because Michael Jackson, an African American, provided half of Paris Jackson's genetic material, she is African American as well. Theories of biological race are the oldest and most obdurate in the United States, but they emerged far earlier than our ability to map the human genome. America's founding fathers based the enslavement of Africans on an abstract notion of biological difference between blacks and whites.[14] Similarly whites' attempts to exterminate Native Americans and steal their lands were informed by the belief in white biological superiority. Restrictions on immigration and abusive working conditions whites imposed on Chinese and Mexican laborers were also justified by these understandings.[15] These early biological definitions of race had no scientific foundation but explicitly wrote into their terms certain moral and economic relations between the races. These simplistic notions of biological race proved to be essential, effective economic tools in the United States, allowing for the economic exploitation of and violence toward any individual constructed as non-white.

In the early twentieth century scientists attempted to provide some foundation for biological race, ushering in the era of eugenics.[16] After a series of dubious experiments mapping brain size and cranium size, experts argued that whites were biologically superior to blacks and other racial groups. Measures like the Johnson-Hart Act of 1924, which effectively barred Asians and Latinos from immigrating to the United States, coupled with cases prohibiting them from naturalizing as citizens, were all informed by a notion of white biological superiority.[17] Courts in particular relied on pseudo-biological arguments about race and blood; p. 129 legislatures also created rules to ensure that children ↳ born of interracial unions were automatically conferred the status of the minority parent.[18] Prominent African American sociologists, such as W. E. B. Du

Bois, used their work to debunk eugenicist claims.[19] However, even after eugenicist arguments were rejected as junk science, arguments about white biological difference continued to play a role in the United States. Indeed, scholars such as Dorothy Roberts have amply demonstrated that these biological, eugenicist notions of race are behind sterilization efforts aimed at minority women though the 1940s and 1950s, and some would argue continue to present day.[20]

Sociologists and humanities scholars shifted in a much clearer, decisive manner away from biological definitions of race by the latter half of the twentieth century. As they moved to a social constructionist model, their analyses continued to stress the concrete material implications race had in structuring economic, political, and social life.[21] Sociologists and historians advocating for this social constructionist model cited numerous examples to prove their claims. They noted US Census definitions of race had changed over time, revealing that "race" is a malleable concept.[22] They showed that the boundaries of whiteness had been renegotiated: today's so-called ethnic whites were previously regarded as fundamentally biologically different from Northern whites in the 1920s and 1930s.[23] Comparative work was persuasive as it showed how racial categories are defined differently in the US versus foreign countries.[24] These facts together made a strong case for abandoning biological race understandings.

Ironically, at the turn of the twenty-first century, the scientific venture some thought would decisively extinguish biological race arguments breathed new life into biological race constructs. When scientists in the Human Genome Project announced in 2000 that their research had revealed humans are 99.9 percent genetically identical across racial groups, some believed biological notions of race would no longer hold sway. Surprisingly, scientists and commercial producers instead highlighted the discovery of this .1 percent difference as proof of genetic race. They claimed that patterns in this small segment of genetic material establish the fundamental differences in physical traits between the races.[25] In rebuttal, other scientists pointed out that there is greater genetic variation within so-called racial groups than one sees when
p. 130 comparing two ostensibly ↳ distinct racial groups. However, over time the argument for biological race appears to have gained greater traction as a result of new genetic analyses. Moreover, biological theories have value for commercial players, including assisted reproductive technology providers selling sperm and eggs based on race, drug manufacturers selling racially targeted pharmaceuticals,[26] and genetic testing companies that now sell at retail genetic racial-background reports.

Biological race remains persuasive for many Americans and scholars in certain fields, but it ultimately proves indeterminate in defining racial identity. Even when a geneticist maps and racially categorizes a person's genes, biological race still provides no answer to the ultimate question: how much genetic contribution should be required to claim one is a member of a particular race? Institutions presented with genetic data to support racial identity claims will still be forced to resort to socially constructed and politically inflected standards to draw lines about the contours of racial identity. Importantly, the Ninth Circuit is currently reviewing a case that poses this precise question. The appellant contends he is eligible to participate in a state-sponsored minority business owner program based on the results of a genetic test showing he is "4%" African.[27] In order to resolve this legal claim the court will have to look beyond the simple percentages offered by genetic tests. In order to resolve this claim the court must engage in a series of functionalist or purposivist inquiries: whether the state's minority business owner program has a precise definition of race, narrowly tailored to the purpose of the program, and consistently applied to the parties that apply for program benefits.

7.1.2 Phenotype/Physical Race

Some Americans believe race is determined by appearance and physical features. This approach is based on a form of social “common sense” about racial categories. Specifically, when one lives in a particular community one is introduced to a certain racial lexicon—an understanding of the phenotypes that are linked with particular racial groups.[28] People in ordinary daily life are subject to a kind of racial visual inspection and drafted into particular racial categories—a process called involuntary racial ascription. Much of the media frenzy over Paris Jackson’s claim of blackness is that she does not have the phenotype typically associated with African Americans. She does not possess chocolate-colored skin, a broad nose, or tightly coiled hair. Rather, collectively Jackson’s straight hair, olive skin tone, and hazel-green eyes make her claims of blackness suspect in the extreme in some quarters. Gordon Allport’s seminal work, *The Nature of Prejudice*, explains how involuntary ascription and physical race have historically ↳ been the primary p. 131 triggers for racial discrimination.[29] For many laypersons and scholars alike, this appearance-based approach to race remains the default, controlling racialization framework in the United States.

Physical race also has a long history in the United States. Indeed during the postbellum era, when legal authorities claimed to be using biological race definitions, they were actually engaged in a close review of physical race and phenotype to make their decisions. Courts in racial-determination trials assessed the skin color and hair texture of claimants to determine whether they were permitted to claim whiteness and enjoy equal rights and benefits as white person. Additionally, up until 1997, with the promulgation of Directive 15, government authorities collected racial information about citizens based on physical race. Various institutional agencies gave parties responsibility for visually inspecting persons under their supervision to determine each individual’s race.[30]

Physical race now faces challenges that it did not face in the past. New immigration patterns and interracial marriages, as well as exposure to the broad range of physical types in a given racial category, have made many Americans realize the limitations of their racial lexicons.[31] Americans are confronted in daily life and popular culture with phenotypically ambiguous persons, persons who could fit into one or more categories. This racial ambiguity sometimes causes them to abandon physical race definitions and resort to questions of racial choice: they ask the individual to racially identify herself. Americans that occupy the margins of existing racial categories report numerous disorienting, dramatic fluctuations in treatment, circumstances in which they are thrust into bold confrontation with racism because third parties either make racial mistakes about what an individual’s chosen racial identity is or because they resist the identity label the individual has chosen. In these circumstances, physical race expectations are a trigger for conflict and push people to look to other racialization models for answers.

7.1.3 Performative Race

More recently, performative race has risen in significance in American society. Performative models rely on the understanding that race is a social construction and a social practice. They further rest on the understanding that certain behaviors and practices become racially linked in American culture and display of these performances or features can be used to establish one’s membership in a given racial category. Under a performativity model, acts or statements play an important role in establishing race, as well as the adoption of certain cultural practices, display of accents or speaking styles, and adherence with certain race-associated aesthetic norms. Under this model of race, Paris Jackson’s statement that she is black stands as key, if not dispositive evidence, in establishing her racial identity.

p. 132 Persons with putatively ambiguous racial features have long recognized the importance of performative race. Indeed, for these persons performative race shapes the world. For example, a woman with olive-tone skin may not be recognized as Latino at her job until she one day speaks Spanish. That same woman could easily be recognized as "Arab" when she mentions that she practices Islam. The same physically ambiguous woman may decide to vacation in the Mediterranean and find her co-workers instead conclude she is Greek. If she wears a Native American pendant on a regular basis, co-workers may conclude she has Native American ancestry. Performative race models recognize that hairstyles, speech patterns, language choices, religious practices, aesthetics, and bodily markings are often the primary evidence used to determine a person's race. Agency becomes key in these cases as the practices and traits used to racially identify an individual may be wholly "voluntary"; they can be masked or revealed depending on the context. In this way, performative models of race focus us squarely on the question of racial choice in ways other models do not.

Classic models of performative race derive from the work of Judith Butler's theory of performativity. Butler posits that people establish social identities through repetitive acts that signal to others membership in a given social category.[32] Butler's work, however, is focused on gender rather than race, but other theorists have used her work to demonstrate why so-called voluntary race-associated behaviors have great importance to the individuals who engage in these behaviors. Butler-derived models in their purest form suggest that no one actually "has" a true race; rather, every person who claims membership in a racial category must actively do work to establish the right to be socially recognized as a member of that racial category. These acts include public declarations, behavioral practices, and acknowledgment of the labels assigned by others. Also, classic models based on Butler's work posit that there is no real choice or agency in the racialization process. One is born into a world that provides for racial categories, and that world insistently demands that one place oneself in those categories. One can experience a sense of agency by choosing between existing racial categories or by choosing between the aesthetics, behaviors, and mannerisms that signal one's membership in a given racial category, but one cannot avoid the insistent drive from others in society to name oneself as a particular kind of racial subject.[33]

As performativity theory migrated into the social sciences and legal scholarship, certain modifications have been made to account for a more classic understanding of rights, power, and choice. This shift is important as many sociological analyses frame the choices people make in choosing between racial categories as an act of agency, as well as formal petitions groups make to government to change officially recognized racial categories. While direct reference to performativity in sociological studies is rare, racialization studies clearly reflect many understandings derived from performative models. For example, performative or choice-based models help sociologists explain p. 133 ↳ the shifting and conflicting racial identity claims racially ambiguous individuals may make. Performativity posits that individuals feel an insistent drive to establish race, and furthermore, they may make different gestures toward different racial categor(ies) at different times, as long as they believe they have some valid claim on these multiple racial identities. Additionally, performative models help explain why social pressures may cause individuals to "perform" race quite differently depending on social context. Indeed numerous studies have shown that individuals' racial identification choices change based on whether family members are present when their choice is made, how public the choice is, what racial categories are included on an identification form,[34] or even recent experiences with discrimination or incarceration.

Additionally, performative models of race help explain the strong interest in voluntary, behavioral race-associated practice demonstrated by persons who easily comport with standard phenotype-race definitions. Butler explains that an individual feels an insistent, continuing drive to establish her social identity. Phenotype in many cases will not be enough for people to feel they have truly claimed a given race. For these persons, practices, in particular race-associated practices, are likely to become a key form of identity expression. Last, performative models allow us to talk about the pleasure as well as the pain produced by racial identification regimes. Performativity models posit that an individual may derive some comfort or happiness from race performance; racial acceptance and recognition are a heady tonic. For many Americans race is not just an obstacle or something to be overcome in the pursuit of social equality. Rather, shared racial identity and recognition have become a key source of pleasure and carry certain cultural, social, and material benefits.

Performativity-based models of race also help explain the evolution and emergence of at least two centrally important racial categories. Specifically, performed notions of identity explain how “Muslims” have emerged as a distinct racial group in the United States. Scholars have observed that the explicit racialization of Muslims in America dramatically increased after America’s conflict with radical Islamic groups in the 9/11 tragedy. These dynamics were further exacerbated by the string of military conflicts the United States has had with Islamic terrorist groups and certain countries with Islamic governments. Voluntary religious practices associated with Islam have become extremely socially salient and are used as racial markers, designating persons who engage in these practices as a single racial group. However, as most people know, practitioners of Islam are a wide range of ethnicities, with different skin color and physical features. The emergence of Muslim as a racial category despite these clear physical differences speaks to the power of performative race models in making sense of contemporary race dynamics. The operation of performed race categories can be quite disorienting for persons subject to them. For example, a Middle Eastern person who is Christian but has a so-called Arab phenotype may automatically be assumed to be Muslim. Conversely, a p. 134 person who has a so-called white phenotype can be recategorized ↳ and racialized as part of the Muslim “race” once he engages in certain socially recognized practices associated with Islam.

Criticisms of performative models of race have been quite sharp in some quarters, in part because these models have been associated with explaining multiracials’ often inconsistent racial identification decisions.[35] Certainly, the rise of the multiracial movement and their activism around Census race designations made performed race an openly discussed concept in a way that had not occurred previously. And although multiracial groups’ petitions to have a multiracial category added to the US Census failed (they were given leave to check multiple boxes to indicate complex racial identities), they succeeded in fundamentally changing discussions of race in the United States.[36] Indeed, in 1997 there was a global decision made to allow government agencies to shift to allowing individuals to racially self-identify rather than rely on third party authority figures to categorize those under their supervision by race.[37] Private industry was directed to follow suit by 2007 when the Equal Employment Opportunity Commission (EEOC) adopted this norm.

Critics’ primary concern is that performative models of race fail to take into account the problems caused by persons with fluid approaches to racial identification. Admittedly, it has become increasingly difficult to chart discrimination dynamics when one is unsure of the criteria people use to opt for a particular racial designation. Additionally, critics argue that multiracials threaten to dilute the power of minority groups’ political efforts because they distract from long-standing concerns about historically embedded discrimination patterns and structural inequality.[38] These criticisms are understandable. However, critics should also acknowledge that without an account of performative race, scholars cannot render visible the full range of persons who occupy a given racial category. Specifically, there are many people accepted within minority communities as black or Latino or Asian who do not display the phenotype normally associated with their chosen racial group. However, because of repeated public declarations confirming their adoption of particular racial identities or their adoption of race-associated cultural or aesthetic practices, these persons are socially recognized and accepted as members of their “chosen” race. Additionally scholars with reservations about performed notions of race can only offer offered anemic, unsatisfying accounts of the experiences of physically ambiguous persons, characterizing these persons as engaging in “passing” or “reverse passing.”[39] However, the entire concept of passing is based on reductionist notions of “race” based p. 135 on narrow, fixed phenotype definitions or worse, biological race, ↳ approaches that have been the key vehicle for racial subordination in the United States and other Western nations.

7.2 Integrated Approaches to Racialization Questions

7.2.1 Elective Race

One can have models that recognize the importance of choice and performance in establishing racial identity and also give due weight to physical race, involuntary ascription, structural inequality, and historically embedded patterns of discrimination. The model of “elective race” I offer in my work offers one possible approach to integrating these considerations. My theory of elective race posits that performative behavior plays a key role in identity construction, chief among them, public proclamations of racial identity. It reflects the norms shift that has occurred over the past twenty years; at present, public acts of personal affirmation and identification are considered key factors in racial categorization.[40] This norms shift does not mean that racial categories will now devolve into confused indeterminate concepts. Rather, far from it. Because we know people now make inconsistent and sometimes controversial claims about race, each institution must take up the challenge of being clearer about what definition of race it uses and how that definition of race is functionally linked to the achievement of the institution’s purpose or goal.

Functionalist inquiries about race will vary depending on the needs of the institution making the inquiry.[41] An educational institution may be asking about race because it wants to ensure people with certain experiences of discrimination are part of a university dialogue or conversation. It should ask questions about race more precisely targeted to identify people with relevant experiences. A cultural organization may want to ensure that it includes members who have a strong connection to certain cultural forms; consequently, the organization’s questions about race should be tailored to inquire about cultural practice issues. If the organization is concerned about having diverse role models or more general perceptions of racial diversity and inclusiveness, it may want to ensure the “racial subject” it intends to hire consistently identifies with the racial designation he or she has chosen for the application procedure or ask whether that person has had experiences being socially recognized by others as being a member of a given racial category. Our pursuit of certain functionalist goals should not be interpreted to diminish any of the expressive identity issues at stake for persons who inconsistently identify by race. These persons may find themselves troubled by the racial category choices that more detailed procedures and racial questions require them to make. p. 136 ↳ Elective race, however, posits that these individual expressive interests may be trumped by the organization’s functionalist goals. Supplementary questions about race that go beyond mere choice-based identification will help the organization make choices about how to select constituents and workers that address the organization’s particular race-related concerns.

Models that try to intelligently deal with racial fluidity and choice must offer scholars language, concepts, and terms that allow us to precisely sort through the various ways people identify by race. For instance, the “elective race” model recognizes that one’s “private race” (the race that one identifies as in private, one’s personal beliefs) may not be the same as one’s “public race”—the race that involuntary ascription causes one to be recognized as by third parties. Additionally, one has a social race—the race one is prepared to publicly claim as one’s own. One also has documentary race—the race one feels compelled to use on official documents and forms when required to do so for government authorities.[42] This language helps us see why our current institutional questions about race are simplistic, fail to collect meaningful data, and fail to serve the purposes for which they are intended.

7.2.2 Application and General Concerns

A few examples help demonstrate the value of more sophisticated discussions about choice-based models of racial identity. These examples make it clear that one can be respectful of an individual's personal identity claims while, at the same time, asking the individual to bracket these considerations to allow an organization to conduct a separate and independent inquiry related to addressing patterns of race subordination. For example, the EEOC historically has been primarily concerned with invidious discrimination against persons with a phenotype or other features typically associated with a given racial group. Consequently, the questions it asks about race should primarily explore physical race or other features that consistently place an individual in a group socially recognized as black or African American. At present the EEOC's questioning protocol misses the mark entirely. The EEOC merely instructs employers to provide employees with a form that allows them to check off racial-identity choice boxes. Individuals are directed to make these choices with no additional instruction to guide persons facing complicated identity choices and pressures.

How might a "racially ambiguous" employee respond to this general EEOC inquiry? An olive-skinned employee from Morocco may' as a "private race" matter, see himself as black, given that he is from the African continent. However, he may feel compelled by the form to record his race as white, as North Africans are instructed on Census forms to identify as white persons. By contrast, his public race—what others see him as—may be "Arab" or "Muslim" because his physical features match the phenotype Americans p. 137 associate with persons of Middle Eastern descent. However, his social race may be African ↳ American as he typically socializes with and is misrecognized as African American in certain contexts. The EEOC's vague question about race is simply too imprecise to ascertain what racialization dynamics this employee faces. A form that more precisely inquired as to the race he is typically recognized as being by others would yield better answers. Alternatively, he could be asked about the race he typically represents himself as being in social and professional contexts.

Much of the anxiety displayed by scholars about choice-based models is understandable; they are concerned that individuals' desire to exercise "free choice" about race will hobble official state-sponsored institutional practices designed to identify racial subjects that are facing certain historically embedded processes of race discrimination.[43] However, the potential instability problems produced by racial choice can easily be addressed if institutions are pressed to develop discrete functionalist inquiries about race that clearly define race in ways appropriate to the purpose the institutional practice serves. Also, critics of "choice"-based models of racial identity often have shallow views about what racial choice actually reflects. Thus far, individuals facing these choice questions are not engaged in a neo-conservative unbounded exercise based on minor expressive concerns. They are responding to structural and environmental considerations like family pressures or discrimination. Racial choice behavior is a key data point: it provides evidence of patterns of discrimination in a particular context. For example, at a recent meeting some law school admissions advisors disclosed to me that some law students, who identified as minority during enrollment to law school, defect and begin to identify as white after matriculation. Rather than branding these students as bad actors, it would be more useful to question why the law school environment is triggering law students to defect from minority racial group categories. Alternatively, it would be more analytically useful to identify ways to strengthen race inquiries during the admissions process to ensure one is enrolling a student accustomed to identifying as a minority. Again, political conflicts,[44] region,[45] and family pressures,[46] among other factors, have all been shown to affect racial identity "choices." Physical race rules also constrain choice. Skin color prevents many black-white multiracials from making more complex identity claims, whereas white-Asian multiracials find more latitude to make such arguments.[47] Sociologists have termed the resistance multiracials face "racial identity contestation," and note its p. 138 importance for future studies of racialization.[48] The key for ↳ future research and theorizing in this area is to avoid indicting people interested in asserting choice or, even worse, erasing their existence in scholarly analyses.

7.3 New Challenges for Racialization Studies

As racialization studies evolve over the next several decades four considerations will fundamentally shape scholars' inquiries. Analytic approaches and understandings from work in the humanities will play a role in managing these new considerations. First, we have entered into a historical period in which people are consciously aware of the multiple ways to define racial identity: biological, physical, and performative. Also, they often are fundamentally conflicted and hold multiple truths about race. This era has emerged because racially ambiguous and multiracial people have been able to rebut or refuse parties' attempts to use physical race models to involuntarily classify them. Our current political context allows people to assert personal control by publicly claiming a given racial identity and having their claims conditionally honored. Additionally, mixed-race Americans' efforts to change the Census also fundamentally changed American culture and encouraged more people who previously identified as monoracial to acknowledge racial mixture in their own backgrounds.[49] Finally, immigrating Latinos from countries with different racial paradigms than the ones used in the USA have resisted attempts to force them into American racial categories. These multiple calls for recognition make it essential that scholars construct analyses that make choice more central in their work.

In order to negotiate this landscape, Omi and Winant's theory of racial formation will play a critical role. Racial formation theory posits that society is in the process of negotiating multiple racial projects at any time, finding different paradigms for understanding race which are based on different norms, relying on different understandings, and creating distinct institutional practices. Yet Omi and Winant were focused on transitions, when one racial project seemed poised to replace or overtake another. At present, the United States seems more on a course in which multiple models will simultaneously hold equal sway. How laypersons manage this multiplicity or determine which definitions of race control in which domains will be an area of study as well.

Understanding the competing racial frameworks in social circulation at present is key for a variety of reasons. Conflicts between rules and regulations or competing ↳ agencies and other legal entities may in large part be explained by the competing and different racial projects that inform legal regimes. For example, US administrative agencies have opted for an elective or choice-based model of race, rejecting prior data-collection procedures that provided for a physical or observed race model. Now the Department of Education and the Census Bureau require the use of choice-based models.[50] Courts, by contrast, continue to use a mix of biological concepts of race (in the form of immutability doctrine) and observed or physical race when rendering decisions about constitutional claims.[51] As I have elsewhere observed, our employment discrimination laws also are informed by biological concepts of race ("immutability") as well as physical race.[52] By contrast, the data-gathering regimes used by the EEOC are based on performed or "choice" models of race. This split in the employment discrimination context creates serious enforcement challenges as employers try to keep track of potential race discrimination trends in the workplace. Different institutional regimes will be required to identify their priorities and their reasons for asking about race. While these conflicts are sorted out sociologists will have much to study in understanding how people negotiate these institutional pressures.

The second fundamental challenge is the need to more decisively move beyond the black-white paradigm in understanding American processes of racialization. Some scholars believe that American racialization processes are primarily driven by a desire by whites to distance whites and other groups from blackness. These scholars worry that a focus on multiracials distracts from the continuing antipathy Americans demonstrate towards blacks and groups associated in the popular imagination with blackness. Yet the black-white paradigm simply does not provide a full map for understanding the experiences of Latinos and additional otherized racial groups in the United States. If scholars are to fully document the experiences of racialized Muslims, Asian Americans, and Latinos, new frameworks with different touchstones will be required. For example, we require more work that focuses on the perpetual imposition of foreignness on ethnically Asian and Latino Americans. We also need more work that explores the conditional acceptance of Asians, Latinos, and multiracials as honorary whites, or what I have called marginal whites, another phenomenon that takes us beyond the black-white frame.[53] Finally there are ways in which practices, such as language choice for Latinos and religious practice for Muslims, become key bases for racializing particular groups. Focusing on black-white relations renders these important racialization processes all but invisible.

Finally, many of our contemporary political fights—a key driver of racialization dynamics—do not directly concern the black-white frame. Surging white nationalism, as well as restrictions on Latino immigration, seems more focused on concerns about racial redistricting—the notion that Asians, Latinos, and p. 140 multiracials may be absorbed ↳ into the category of whiteness. Additionally, North African and Middle Eastern persons, responding to experiences of discrimination in post 9/11 America, have called for more recognition as distinct racial or ethnic groups. These groups and the political trends they represent merit more examination and discussion in the decades to come if we are to accurately reflect the realities of race in America. Certainly, anxieties about blackness will remain an important part of our understanding of contemporary racial conflict in the United States; however, racialization studies cannot accommodate the full complexity of race in the United States without a richer multivalenced approach to the emerging importance of other racial groups and issues beyond the black-white frame.

The third and perhaps most difficult consideration is understanding the role the market is playing in contemporary accounts of racialization. While race has always played a role in commercial markets, the current era reveals different commercial forces at play. Specifically, the concept of biological race is being marketed for the first time at the retail level. As a consequence, commercial marketing campaigns have become important factors in understanding the racialization process in the United States. For example, in the assisted reproductive technology (ART) market, biological products, such as sperm and eggs, are sold in ways that encourage people to conclude there are stark genetic racial divides that should not be crossed. Additionally ART providers commodify traits based on phenotype without acknowledging the instability of existing racial paradigms. These marketing practices further instantiate biological concepts of race.[54] Ironically, ART providers inside business practices reveal they do not hew to biological notions of race. They do not genetically test any of their donors for “race”; rather, they merely allow donors to self-identify and they group donors based on apparent physical characteristics.

Additionally, Americans are also being sold genetic testing kits that promise to offer them the genetic truth about their ancestries. This product and service relies on a fair degree of historical interpretation to map certain genes to certain regions of the world. Different companies and different genetic testing kits yield different results. Yet this instability in race as well remains hidden, and biological claims about race are strengthened because of the claims marketers make when selling their products. Finally, pharmaceutical campaigns that encourage people to believe medicines have different success rates with different racial populations also further instantiate biological race understandings. They focus people’s attention on racial difference rather than the actual biological and genetic factors that lead to different efficacy rates precisely because it is easier to sell product using race-based appeals. The repeated commercial invocation of biological race is a powerful force that strengthens belief in biological theories, and no contrary or competing notion of race enjoys this particular persuasive advantage.

The fourth challenge is related—managing new concepts of biological race. Today’s gene technology has a p. 141 stronger air of scientific legitimacy than prior claims of biological ↳ race which rested on pseudo-scientific protocols. Indeed the new emergence of genetic-race concepts suggest racial understandings are more obdurate and sticky than ever. One sees that ambiguous scientific data will tend to be organized, emphasized, and packaged in ways that confirm historically established expectations about race rather challenging them.[55] Additionally, it is particularly worrisome that biological race has gained new traction in an era of increased white nationalism. While the emergence of these studies and commercial marketing is not clearly connected to these movements, the white nationalist community in the United States has harnessed these understandings of biological race and used them to their advantage. Increasingly hostile immigration policy is motivated by concerns about the dilution of Northern European stock in the US population.

In studying the resurgence of biological race, sociologists may find guidance from the work done in the humanities. For many of the claims about the supposed racial basis of particular gene segments are based on particular historical narratives that may be in contention, and all of these accounts rest on the construction of narratives about how tribes moved and the results of these migrations. Additionally, different entities selling genetic testing kits will produce different results based on the same genetic sample. While the new era of genetic testing promises to be more exact and precise about racial identity, it is instead another site of multiple "truths." Sociologists studying individuals' use of these kits and the effects they have on individuals' understanding of racial identity have an opportunity to test people's comfort with this new site of racial ambiguity and the effectiveness of historical narrative in fixing meaning of otherwise indeterminate test results.

7.4 Conclusion

Racialization scholars will find their work in much demand over the next several decades. Despite claims in the early twenty-first century that the United States was evolving toward a new "post-racial" society that looked beyond race,[56] the rise of white nationalism, race-based anti-immigrant rhetoric, and increasing racial tensions in the United States establish that race is still a key structuring principle in Americans' lives. One could argue that we are even more focused on race given the different domains and different languages we now use to describe claims of racial identity. These conversations range from the inquiries of pop-culture gossip magazines to the hypothesis testing and musing of geneticists. Americans are still highly concerned with discovering the racial truth of their own body and others' bodies.

Humanities scholars and social science scholars studying racialization dynamics will find their work p. 142 converging in important ways. Both groups will be required to recognize ↳ the important role language constructs and narrative play in shaping individual racial identity claims and the perception of social reality. Humanities scholars are better positioned, given their work in discursive studies, to recognize there is no "ultimate truth" that will be generated from our analyses. Rather different constituencies with different definitions of race will come to different conclusions about a given subject or individual. While there has been a great deal of hand wringing and concern about instability and confusion, there is less reason for concern than it appears. Consensus is easy when the multiple racialization frameworks—physical, performed, or so-called biological race—all dictate the same answer. In many cases they will. Yet the cases at the margin force us to ask hard questions about what we mean when we ask questions about race. Are we asking about culture, experiences of discrimination, social stratification based on institutional racism, or political affiliations? These questions must be answered with precision to talk intelligently about racial politics and racialization.

This chapter ends where it began, with the question posed by the Western press regarding Paris Jackson's racialization journey: "why we can't just 'let Paris Jackson' be Black?" Armed with a better understanding of the complex structure of racialization in the United States and other industrial democracies, one knows that this question is far too simple to generate any meaningful answers. Instead we should investigate who it is we think has the power to “let” Jackson be black, and in what context. Functionalist inquiries about race push us to frame our discussions in this way, forcing us to ask hard questions about why race is being used in a particular context and to determine what purpose a given racial regime serves. The answers generated by these questions will likely lead to more questions, but they are far more helpful in understanding the politics of today’s world. Indeed, they are the best way to understand contemporary modes of racialization and the best approach for charting a path out of America’s racial ambiguity blues.

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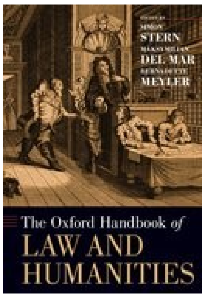

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CHAPTER

8 Disability, Law, and the Humanities: The Rise of Disability Legal Studies

Rabia Belt, Doron Dorfman

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Abstract

Disability studies is a relatively new academic discipline that approaches disability as a social, cultural, and political phenomenon and has a firm foothold within the humanities. This chapter will offer a broad, interdisciplinary overview of the achievements and challenges of disability law in both the American and international contexts using a disability studies-humanities-oriented approach. The chapter emphasizes the notion of intersectionality and the ways disability correlates with other identity groups such as people of color, women, LGBTQI, and immigrants and their treatment under the law. The use of philosophical, historical, literary, and artistic perspectives will help demonstrate the "disability angle" to the legal story of rights and recognition for individuals with disabilities, as well as for other civil rights groups, while looking ahead and exposing remaining challenges.

Keywords: disability, intersectionality, universal design, social movements, gender, race, class, international law

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8.1 Introduction

SINCE Donald Trump announced his candidacy for the presidency of the United States, he has managed to shock a multitude of Americans. One of the most astonishing events was on November 2015 when Trump apparently mocked a disabled reporter through exaggerated physical movements. Even for people numbed by Trump's actions, this seemed to be a step beyond the pale. Polls attested to the mass negative reaction to Trump's mockery and Meryl Streep made it the focus of her remarks when she received a lifetime achievement award at the 2017 Golden Globe Awards.

The blanket condemnation of taunting a person with a disability might suggest a commensurate widespread awareness and support of disability law and politics. Disability advocates, however, quickly pointed out elements that were missing in the popular narrative of the incident. The reporter was often described as a disabled reporter without name or context. In fact, the reporter was Serge Kovaleski, who had more than thirty years of journalism experience and has won the Pulitzer Prize for his reporting. Furthermore, while Americans objected to the spectacle of Trump bullying one individual disabled person, news reports did not link the incident to broader issues of disability policy and politics.

Despite the fact that people with disabilities are the largest minority group in the USA[1] and in the world,[2] p. 146 until recently, research on inequality has mostly ignored the ↳ topic of disability.[3] This silence in the literature tacitly reinforced the notion that some people possessed biological differences that justified subordination. Starting in the late 1960s, disability advocates challenged ableist assumptions about their existence and catalyzed the still-evolving academic field of disability studies. Scholars now study disability as its own category of analysis alongside other axes such as race, class, gender, and sexuality. Disability studies concerns itself with human difference and the ways people with disabilities have been pushed out of what society conceives as the "normal." The critique of normalcy as an historically socially constructed category has thus been a cornerstone in the field.[4] Although interdisciplinary, the American strand of disability studies has a strong footing in the humanities.[5]

8.2 The Construction of Disability in American History

Throughout the course of history the treatment of disabled Americans was guided by eugenic notions. Eugenics is the marriage between ideology and biology. The term was coined by British statistician Francis Galton who, in 1883, seven decades before the discovery of DNA, theorized about a social mechanism for deciding which strains of blood or races should and should not procreate. This idea about improving genetic quality and ensuring the purity of humankind was commonplace in the late nineteenth and early twentieth centuries. It influenced policies that can be broadly divided into "positive eugenics"—ensuring that people with "good genes and traits" reproduce by issuing official marriage licenses to "worthy couples" and endorsing "better baby competitions"—and "negative eugenics"—designed to prevent reproduction by widespread practices of sterilization and institutionalization of the "socially inadequate" deemed to be a burden on society. Those policies have a grave impact on people with disabilities, who, historically, have borne the brunt of being designated as biologically inferior through labels such as "feeble minded," "insane," "epileptic," "inebriate," "criminalistic," or "degenerate." For example, more than 60,000 disabled Americans were forcibly sterilized in institutions, where they were excluded from all aspects of civic life. The infamous case of Carry Buck, where the Supreme Court upheld the Virginia sterilization law put in place to stop the "flood of defects," is the ultimate reminder of a history of segregation and mistreatment.

p. 147 In the mid-twentieth century, the disability movement began in two main countries almost simultaneously: England and the United States. In England, the Union of Physically Impaired Against Segregation (UPIAS), a radical organization comprised of physically disabled male veterans, was the first group to shift the focus of their opposition away from their bodies and toward societal barriers. Moreover, they contended that disabled people are a discrete political group: “In our view it is society which disables physically impaired people. Disability is something imposed on top of our impairments, by the way we are unnecessarily isolated and excluded from full participation in society. Disabled people are therefore an oppressed group in society.”[6]

British scholar Michael Oliver later fleshed out the arguments of UPIAS and other political groups in academic scholarship and coined the social model of disability. The social model of disability distinguishes between an “impairment,” which is a biological condition, and “disability,” which is the social meaning given to the impairment. Disability scholars compare it to the distinction between “sex” and “gender” in gender studies.[7] The social model stands in contrast to popular views of disability as intrinsic to the individual (the individual model of disability) and as a purely medical condition defined by doctors (the medical model of disability). Disability advocates argued that both the individual model and the medical model emphasized an understanding of disability as a negative factor in one’s life. This view of disability as a deficit interprets it as a tragic circumstance, a miserable existence, and an incomplete state that should be fixed at all costs and is the subject of pity and benevolence by greater society.[8] By contrast, the social model questioned the primacy of medical expertise and authority and challenged the idea that only medical and rehabilitation experts should have the power to make decisions about the lives of people with disabilities.

Around the same time that English disabled veterans formed UPIAS, a California man named Ed Roberts decided to transfer from San Mateo Community College to UC Berkeley. Roberts contracted polio when he was fourteen. He was a wheelchair user and had to spend eighteen hours a day in an iron lung, a large tube-like machine that applied pressure to his chest and abdomen so he could breathe. Despite human obstacles p. 148 such as the UC Berkeley dean who told Roberts that “we’ve tried cripples before and it didn’t ↳ work,” and architectural barriers such as inaccessible classrooms, libraries, and other facilities, Roberts moved into Berkeley’s infirmary, Cowell Hospital, and enrolled as a student. In 1967, Roberts graduated with a bachelor’s degree and began a pursuit of a doctorate in political science, also at Berkeley. By that time, twelve other disabled students lived with him in Cowell Hospital and pursued their education in Berkeley. These students, known as the “Rolling Quads,” took their inspiration from the Civil Rights Movement. They fought for curb cuts as well as less stigmatizing and more appropriate housing for disabled students, and they began working toward creating an independent living program. In 1972, their ideas about independent living coalesced into the Center for Independent Living (CIL), an institution run by disabled individuals that provided support and advice for people living with a broad range of disabilities who wished to live embedded within communities. The CIL model spread across the nation primarily through the efforts of disabled people who wanted to make their own decisions about their lives.[9]

Pivoting over to the East Coast, Judith Heumann became the first teacher who used a wheelchair in New York City in 1970.[10] Like Ed Roberts, Heumann’s path was not an easy one. She was initially denied her teaching certificate because she failed the physical examination. The testing administrator questioned whether Heumann could reach the bathroom to attend to children during an emergency. Heumann filed a discrimination suit against the New York Board of Education, which was later settled. She moved to California in 1973 and became the Deputy Director of the Berkeley CIL and the co-founder of the World Institute on Disability with Roberts. To this day, Heumann is an activist for disability rights.

Perhaps not coincidentally, in 1976, the United Nations proclaimed that 1981 would be the International Year of Disabled Persons and called for an action plan that would emphasize “full participation and equal opportunities.” This proclamation marked the beginning of an active era of discussing disability rights within the United Nations and international law. Within the United States, disability activists engaged in the longest occupation of a federal building to date in 1977. The sit-in within the San Francisco offices of the Department of Health, Education and Welfare lasted for twenty-five days.[11] The protest was against the delay in enacting regulations to help implement Section 504 of the Rehabilitation Act’s prohibition of disability discrimination.[12] The act of resistance and protest, regarded as “perhaps the single most impressive act of civil disobedience in the United States over the last quarter-century,” ended in victory and p. 149 the ↳ regulations were signed into law.[13] Another significant moment was the Capitol Crawl of March 12, 1990. On that day, hundreds of people with disabilities, led by activist Bob Kafka, who established an organization called Americans Disabled for Accessible Public Transit (ADAPT), gathered at the foot of the Capitol building in Washington, D.C., to protest the slow progress of the Americans with Disabilities Act (ADA) bill through Congress. Dozens of activists then left their wheelchairs behind, got down on their hands and knees, and began pulling themselves slowly up the capitol steps, “as if daring the politicians inside to continue ignoring all the barriers they faced.”[14] The iconic image of the physically-disabled protesters drew national media attention and pushed lawmakers to pass the ADA.[15]

8.3 Forging Group Consciousness

The social model of disability linked together the disparate threads of disability activism and consciousness sparked in the second half of the twentieth century. Focusing on social attitudes and stereotypes toward people with disabilities created a common ground for people experiencing discrimination and exclusion based on a variety of impairments. Activists and scholars labeled this phenomenon “ableism,” or the negative rating of a person’s abilities and productivity based on assumptions about that person’s capabilities as assessed by non-disabled people.[16] Ableism encompasses deeply held beliefs about productivity, attractiveness, and the value of human life.[17]

A key component of ableism is stigma. Sociologists Erving Goffman, Saad Nagi, and Irving Kenneth Zola as well as sociolegal scholar and founder of the National Federation of the Blind Jacobus TenBroek exposed how negative assumptions about disability caused psychological injury for disabled people. Disability theorist Robert McRuer famously juxtaposed “compulsory heteronormativity” to “compulsory able-p. 150 bodiedness,” demonstrating how the hegemonic push for “normal” bodies and minds ↳ oppress those who do not fit those intertwining “ideals.”[18] Disability legal historian Rabia Belt expands on this work by exploring an historical example of “compulsory able-mindedness” with prohibitions against voting for people deemed mentally incompetent.[19] For instance, women suffragists worked to distance themselves from mentally disabled individuals who, like them, were not allowed to vote, in an effort to gain the franchise.

As a rebuttal to this negative stereotyping, disability advocates reclaimed their stigmatized impairments as life enriching and contributing to human diversity. Borrowing from racial minority activists, people with disabilities began to see themselves as a minority group—an oppressed community that had a distinct social identity deserving of a rights-based approach to their needs as opposed to pity and paternalism.[20] British disability studies scholars John Swain and Sally French coined “the affirmative model of disability” as an offshoot of this social model approach. This model confronts the view of disability as a tragedy and reframes it as a positive personal identity and a source of pride.[21] In that vein, individuals with disabilities started to “reclaim” the previously negatively charged terms “crip” (short for the derogatory term “cripple”) using it in a positive manner to denote their own fierce agency over previously subaltern identifiers. This move led to a theoretical-critical strand within American disability studies known as crip theory which joins the critical suite of queer theory, critical race theory, and critical feminist studies.

In sum, the social model helped unite a group of people with different impairments by exposing what they had in common—social oppression. As bioethics and disability studies scholars Michelle Fine and Adrienne Asch observed:

> Why should a limb-deficient girl, a teenager with mental retardation, or a blind girl have anything in common with each other, or with a woman with breast cancer or another woman who is recovering from a stroke? What they share is similar treatment by a sexist and disability-phobic society. This is what makes it likely that they will be thrown together in school, in the unemployment line, in segregated recreational programs, in rehabilitation center, and in legislation.[22]

Within this umbrella idea of disability are a number of smaller groups organized around a single impairment. The first and still most significant is the Deaf community. Members of this community utilize the term “Deaf” with a capital D to signify a cultural community as a contrast to a lower-case deafness that identifies hearing loss. Some members of this community reject the label of disability altogether and consider themselves a p. 151 ↳ cultural and linguistic minority that views their hearing impairment as “Deaf gain.”[23] Similarly, the Mad Pride movement, started in the 1970s, challenges the primacy of psychiatric diagnosis under the *Diagnosis and Statistical Manual of Mental Disorders*, the handbook of psychiatrists. Many of the mad movement activists identify themselves as psychiatric system survivors or consumer/survivor/ex-patient (c/s/x).[24] A newer movement, the neurodiversity movement, is primarily composed of people on the autism spectrum, but it may also refer to people with bipolar disorder or traumatic brain injury. This movement, which originated in the 1990s, rejects the medicalization of impairments and sees autism as a product of neurological differences, not deficits or diseases, that have always existed in the human population and thus should be respected rather than cured or eliminated.[25] The neurodiversity movement has flourished on social media, video sharing sites (such as YouTube), forums, and listservs which have allowed autistic advocates, writers, and artists to share their work and contest inaccurate and oppressive representations of autism, protest against violence against autistic people, and advocate inclusive policies.[26] Above all, disability activists across impairments focus on the mantra “nothing about us without us,” the idea that the experience and expertise of people with disabilities should be foregrounded in the policies designed to determine their fate.[27]

8.4 Stigma, Intersectionality, and Legal Recognition

Looking at the legal system through a disability studies lens exposes biases and stereotypes that are deeply embedded into the law. Scholars and activists expose the gulf between the affirmative disability identity held by disabled individuals or subgroups and the negative disability treatment imposed by the legal system in issues ranging from p. 152 ↳ torts cases[28] to Social Security benefits adjudication[29] to antidiscrimination claims.[30] These movements within the broader frame of disability challenge a wide range of legal issues related to education (oral education vs. sign language), incarceration and the death penalty (of people with mental disabilities), violence within the family (against autistic family members), and biomedical interventions (regarding the search for cures or vaccines for autism and deafness, technology such as cochlear implants, growth attenuation treatment for children with multiple severe disabilities, and selective abortion based on disability diagnosis).

The disability rights movement as well as disability rights scholars have been criticized for focusing on physical and sensory disabilities (such as blindness and deafness) and paying much less attention to intellectual and mental disabilities.[31] Criticism of the focus on physical and visible disabilities went hand in hand with criticism about a lack of intersectional awareness in disability scholarship. Disability closely relates to class,[32] race,[33] gender,[34] and sexual orientation.[35] Historical narratives of eugenics as a program of selective reproduction to prevent the degeneration of humankind,[36] as well as systems p. 153 ↳ of identification such as fingerprinting,[37] can demonstrate the oppression of all of those minority groups based on the idea of medicalization and embodying social difference as biological. In addition, disability has served as an excuse for the separation and "a justification of inequality" throughout American history: from mental illnesses attributed to runaway slaves to immigration policies and sterilization laws.[38]

Nevertheless, for many years, disability studies has not fully incorporated this intersectional perspective. As the late disability studies scholar Chris Bell wrote: "Disability Studies, while not wholeheartedly excluding people of color from its critique, by and large focused on white individuals and is itself largely produced by a corps of white scholars and activists."[39] An historical account by disability rights activist Corbett O'Toole explains how independent living centers in San Francisco refused to assist AIDS patients who went blind during the AIDS epidemic in the 1990s because the disability community wanted to distance itself from the gay population.[40]

It is often difficult to unravel and isolate how racism, homophobia, or misogyny intersects in specific circumstances.[41] However, it seems like disability still plays a role in justifying discriminatory policies. This is the case with the overdiagnosis of black boys as learning disabled and the need to put them in "special education"—in what has been labeled the school to prison pipeline[42]; or police brutality incidents where policemen defended themselves by arguing that a victim's disability posed a threat that justified the use of deadly force.[43]

Legal developments for people with disabilities have emerged out of political contestation. The centerpiece of US disability law is the Americans with Disabilities Act, enacted in 1990. Regarded as "the 20th-Century Emancipation Proclamation for people with disabilities,"[44] the ADA seeks to reconceptualize the ways in which society views and treats disability. The definition of disability in the ADA consisted of three conditions: "(A) a physical or mental impairment that substantially limits one or more major life activities … (B) a record of such an impairment; or (C) being regarded as having such an impairment." This definition not only protects a person who presently has an impairment but also allows for persons who had one in the past (like a cancer survivor) or someone with a perceived disability (like a person perceived by others to have a mental disability or some kind of cosmetic disfigurement) to receive the anti-discriminatory protection of the ADA. This definition, therefore, has elements borrowed from the social model, as it recognizes the way disabling attitudes themselves can make someone deserving of protection against discrimination. Interestingly, the drafters of the ADA did not anticipate that this broad definition, borrowed from the Rehabilitation Act of 1973, would cause problems in federal courts, since no issues regarding this definition were ever raised in litigation under the Rehabilitation Act.[45]

In the first twenty years since the ADA's enactment, however, court decisions chipped away at the expansive definition of disability presented in the statute. Before 1998, plaintiffs basing their arguments on the ADA lost in over 90 percent of the cases in federal courts.[46] In 1999, the Supreme Court delivered the infamous trilogy of *Sutton v. United Airlines*,[47] *Murphy v. United Parcel Service*,[48] and *Albertson's, Inc v. Kirkingburg*,[49] and in 2002, it decided *Toyota Motor Manufacturing, Kentucky, Inc v. Williams*[50]; all of these decisions ruled against a broad definition of disability. In *Toyota*, the opinion stated that the statutory definition of disability should be "interpreted strictly to create a demanding standard for qualifying as disabled."[51]

Analyzing the judicial backlash, legal scholar Michael Waterstone concludes that the ADA legislation was ahead of its time. Courts were skeptical of cases where the plaintiffs did not fit the predominant public vision of a person with a disability who was a wheelchair user or who had a sensory disability. The disability rights movement never embraced the model of impact litigation, backed by a national coalition of advocates and activist groups, used by other American civil rights groups.[52] All eighteen of the disability rights cases heard by the Supreme Court before 2012 were brought by individuals acting independently. The lawyers who argued or initiated those cases did not "spend a significant part of their professional time on disability rights cases or [have] a formal connection to a disability rights organization. … [They were] without significant civil rights experience."[53] Waterstone contends that passing the ADA was an "easy victory," as the disability rights movement did not have to seek social support for its enactment outside of its core

p. 155 community.[54] Compared to other ↳ social movements that found it necessary to take to the streets and provoke “conflict” in order to raise awareness, and to use carefully planned strategic litigation that would redirect them after their victories and losses, the disability rights movement had it relatively easy. While disabled individuals certainly faced opposition when they asserted themselves, they did not have enemies such as the Ku Klux Klan, Bull Connor, or George Wallace like the traditional Civil Rights Movement. Thus, they were able to pass an extremely progressive piece of legislation with very limited opposition. In fact, advocates of the law made the deliberate decision to avoid the media, which they believed conveyed a picture of disability as a pitiful state that needs to be overcome at any cost. This portrayal was exactly what they hoped to avoid by enacting a civil rights law (as opposed to a benefit or welfare system).[55]

Time will tell where disability law is headed in the future. On the international front, nearly every country in the world has ratified the UN Convention on the Rights of Persons with Disabilities (CRPD), adopted in 2006.[56] The United States is a prominent exception. The convention embodied both notions of full participation in the drafting of the treaty by disability rights organization and activists with disabilities[57] as well as the social model paradigm.[58] The Americans with Disabilities Amendments Act of 2008 (ADAAA) recalibrates the understanding of disability back to the original meaning of the ADA in a refutation of early Supreme Court ADA jurisprudence. The ADA has also “gone on the road,” influencing anti-discrimination laws around the globe from Germany to Japan.[59]

Disability scholars and activists have criticized the social model for its limitations. Some scholars contend that disability cannot be completely disassociated from health conditions or impairments.[60] Living with disabilities can also mean dealing with pain and emotional discomfort that result from impairments and not from social oppression. Few people, for example, conclude that chronic pain makes them happy or
p. 156 fulfilled.[61] Furthermore, focusing on social oppression could potentially minimize the very real ↳ need for healthcare.[62] The social model of disability has thus been undergoing a metamorphosis. In the CRPD, for example, disability is acknowledged as “[a]n evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.”[63]

Disability is thus an interactive, fluid process that is multidimensional and dynamic, with both biological and social components.

8.5 Looking at the Law Through a Disability Studies Lens

In 2006, legal scholar Sagit Mor conceived disability legal studies. This new field merges disability studies and legal studies and as such, examines the role of legal norms, actors and institutions in the construction of disability:

> A disability legal studies analysis understands disability as a socially constructed category whose diverse meanings, origins, and consequences are a result of power dynamics. The law in this view is an arena of struggle in which the meaning of disability is constantly formed and transformed, contested, negotiated, defied, and interrogated, constrained and liberated. … Euthanasia, abortion, sterilization, institutionalization, guardianship, welfare benefits, civil rights, are just a preliminary list of the sites where disability is not only a term to denote a group of persons affected by a certain policy (and therefore should not be discriminated against), but also an organizing principle that permeates the very framing of the issue and that shapes its logic.[64]

This articulation of the critical approach to the legal treatment of disability came at a contentious time for American disability rights, soon after “the backlash against the ADA.” Looking at the law through a disability studies perspective is valuable for a few reasons. First, disability directly or indirectly affects, or will affect, every single person. Disability scholars note that able-bodied people are more correctly defined p. 157 as "temporarily able bodied"[65]; moreover, able-bodied people likely have friends or family members ↳ who are disabled. Disability after all, as we already mentioned, is the biggest minority in the world. Second, disability is an "inclusive category,"[66] one that intersects with race, gender, sexual orientation, immigration status, and religion. Every case "has a disability angle" to it,[67] one that influences the evaluation of the facts and could illuminate new claims or defenses. Third, disability teaches us about our legal system by shedding light on the values, histories, and intentions behind rules and court decisions.[68] *Buck v. Bell* exposes views on productivity, human value, and reproduction. The Unsightly Beggar Ordinances known as the "Ugly Laws," which spread across the country in the late nineteenth century prohibiting those who are deemed unsightly from going in public,[69] teache us as much about the regulation of property and labor as about the criminalization of poverty. As legal scholar Arlene Kanter notes:

> Disability Studies provides a vehicle with which to explore questions about the rights and responsibilities of citizens and the general role of the government in promoting and protecting the welfare of all citizens. Just as discussions of gender and race have had an impact well beyond women and people of color, so too can disability force the legal academy to reconsider the economic, social, political, cultural, religious, legal, philosophical, artistic, moral, creative and medical aspects of almost everything "we have taken for granted."[70]

Finally, disability studies also gives us tools to imagine and design a better future. If in the minds of many a future that includes disability equates a miserable prediction of isolation and bitterness, that some would think is not even worth living, disability theorist Alison Kafer conceives a different imagined future with the help of her peers:

> Those who have been most vocal in imagining my future as ripe with opportunities have been other disabled people, who are themselves resisting negative interpretations of their futures. They tell stories of lives lived fully, and my future, according to them, involves not isolation and pathos but community and possibility: I could write books, teach, travel, love and be loved; I might raise children or become a community organizer or make art; I could engage in activist struggles for the rights of disabled people or get involved in other movements for social justice.[71]

Universal design (UD) is an approach that aims to promote the broad inclusion of diverse bodies in society. Starting out as an architectural concept, within disability studies, the meaning of UD has proliferated as a concept with ideological, political, and epistemological meaning beyond the design of the physical p. 158 environment.[72] In contrast to ↳ legal approaches, such as that of the ADA, that make access an issue pertaining exclusively to disability, UD understands that built environments, cyberspace, products, programs, and services collectively exclude bodies that do not fit the "norm." It therefore argues for design, in the broad sense of the word, that would accommodate every type of body regardless of sex, age, or ability. The concept of UD appears in the CRPD requiring states parties "to undertake or promote research and development of universally designed goods, services, equipment and facilities … which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines."[73]

The intersection between concepts of UD, accessibility, and access to justice has implications for a variety of legal areas including physical access to courts,[74] rules regarding legal capacity,[75] information and language barriers,[76] biases affecting the legal process[77] and entry to the legal profession,[78] and legal representation.[79] Thus, lessons from the vast experience of the disability community in fighting for its civil rights and from the field of disability studies should be implemented to make the legal system more accessible not only for disabled individuals, but for myriad communities and needs as well.[80]

Other subfields within civil rights have started borrowing aspects of disability law for their own ends. For example, in a recent decision by the district court in Pennsylvania a federal court ruled for the first time that transgender people are not categorically barred from seeking relief from discrimination under the ADA. A member of the LGBTQ community used the medical diagnosis of gender dysphoria as a way to receive civil rights protection. This was possible because of the medicalization of disability enshrined in the ADA. In *Blatt v. Cabela's Retail, Inc*,[81] the Pennsylvania court granted protection for Kate Lynn Blatt, a transgender woman, who sued her employer for workplace harassment. Blatt was pursuing charges under both Title VII of the p. 159 Civil Rights Act, for sex discrimination, and the ADA, based on the fact that Cabela's, her employer, ↳ had refused her reasonable accommodation in the workplace for her disability. The claim was as follows: because Blatt had been formally diagnosed with gender dysphoria disorder in 2005, she had a disability that required accommodation, including a name tag with her correct name and the use of female restrooms. Not only did her employer deny these accommodations, but she was also harassed and then abruptly terminated in 2007. Thus, when Blatt decided to take her case to the courts, the idea was that gender dysphoria, a condition experienced by many trans people, could conceivably work in the same way as a disability, keeping trans people from being able to participate in their jobs in the same way as folks without a disability. Therefore, she needed to be accommodated.

What has been referred to as a landmark victory for trans rights[82] can be problematic considering both the idea of medicalization of disabled bodies as well as that of intersectionality. According to the case, in order to be protected by the ADA, a trans person needs to obtain a diagnosis of gender dysphoria disorder. Thus, that person needs access to a doctor who would provide a formal medical diagnosis. But what about the trans people without the money, insurance, time, or desire to see a therapist and get diagnosed with gender dysphoria disorder; are they not entitled to protection? In addition, people with disabilities constantly need to undergo approval of their disability through doctors and physicians, when navigating through bureaucracy and the legal system. Although a medical diagnosis might seem inclusive, in many cases, it "tends to produce not straightforward answers but documentary sprawl, increased uncertainty, and bureaucratic stagnation."[83]

In June 2017, over forty ADAPT protesters were arrested after they gathered and chanted outside Senate Majority Leader Mitch McConnell's office on Capitol Hill over the GOP's failed attempt to repeal the Affordable Care Act.[84] In Denver, Colorado, the base state of ADAPT, ten protestors were arrested in a two-day sit-in they organized at Republican Senator Cory Gardner's office. The protesters chanted "Rather go to jail than to die without Medicaid!"[85] The day after the arrest, other protesters held a vigil outside the Denver downtown jail.[86]

p. 160 Photos and videos of protesters being pulled from wheelchairs and arrested have surfaced on social media as well as news outlets; it seemed like the golden days of mobilization of disability rights are back.[87] This time the social struggle focused on healthcare and social welfare, which are no less of a barrier for inclusion than discrimination. As articulated by Samuel Bagenstos:

> People with disabilities face an array of deep-rooted structural barriers to work. These barriers—the lack of access to personal-assistance services, accessible technology, home modifications, and accessible transportation, together with the structure of our health care system—operate to keep many people with disabilities out of the workplace well before any individual employer has an opportunity to discriminate against them. An antidiscrimination model does not appear to be a promising means of attacking those barriers.[88]

But these new instances of disability activism may threaten to reproduce the troublesome dynamics of the older disability movement, with its emphasis on spectacle and the foregrounding of white people with physical disabilities. Time will tell how new disability scholarship and activism will reshape the minds of the general public and influence the view on disability rights not only as an anti-discrimination category, but also in the broader sense of social welfare policy and the right to health.

Acknowledgments

We dedicate this chapter to the memory of Carrie Ann Lucas, an attorney, activist, and advocate who tirelessly fought for the rights of parents with disabilities and for adequate health care for the disability community. Carrie was one of the leaders of the 2017 protests against the GOP attempts to repeal the Affordable Care Act held in Denver, Colorado, which we discuss in the last part of this chapter. She passed away on February 24, 2019, at the age of 47 from complications related to a lung infection for which her health insurance allegedly denied her appropriate medication. Carrie was a disability justice champion who left a mark in the lives of many—she will never be forgotten.

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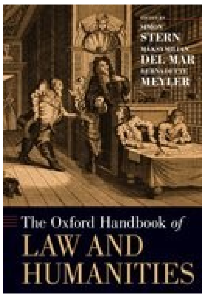

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CHAPTER

9 Psychoanalysis and Law

Tracy McNulty

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Abstract

This chapter attempts to tease out the most important implications for law and legal theory of Sigmund Freud's speculative essays on the origins of human society, and in particular his thesis that the first laws were created in response to the prehistoric murder of a primitive father whose power and authority they alternately preserve, displace, or transform. Putting Freud's cultural writings in dialogue with later writings on law by Jacques Lacan, Mladen Dolar, and Pierre Legendre, the essays suggests that psychoanalysis allows us to distinguish two fundamentally different registers of law, imaginary authority, and symbolic constraint, whose stakes it explores through readings of totemism, the group psychology, and the Mosaic law.

Keywords: psychoanalysis, Sigmund Freud, Jacques Lacan, Totem and Taboo, Moses and Monotheism, Decalogue, incorporation, introjection, superego

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WHILE we often experience prohibitions and laws as sources of privation (preventing us from having or doing this or that), Sigmund Freud's work allows us to ask: why do we have laws in the first place? The answer to this question cannot be sought solely in a pragmatic register, for example the view that laws are essential to maintain order, safeguard rights, or protect personal property. Instead, Freud argues that human beings derive a psychic benefit from the prohibition, even as they complain about the privations it imposes.

Freud's interventions into the field of law are concerned primarily with the prohibition and the primitive taboo from which it derives. In *Totem and Taboo*, he derives the origins of law from the murder of the primitive father and the totemic belief systems to which it gives rise, which he understands as the earliest form of the social pact. His argument draws on two earlier attempts to reconstruct the origins of human society: Charles Darwin's *The Descent of Man* (1871) and William Robertson Smith's *Lectures on the Religions of the Semites* (1894). Darwin deduced from the habits of the higher apes that humans originally lived in small hordes dominated by a violent and powerful male, who jealously defended his claim to the females of the horde and drove away his sons as they matured. He hypothesized that the jealousy of this primitive father might explain the origins of the later practice of exogamy, where the offspring of the clan are obliged to seek marital partners outside their own social group. While Freud adopts some aspects of Darwin's theory, and in particular his postulation of a jealous father at the head of the earliest human groups, he also cautions that "this earliest state of society has never been an object of observation."[1] More importantly, it does not correlate particularly well to the observed features of real human societies: in particular the totemic social structures that were once common all over the globe. In fact, Freud writes, "the most p. 164 primitive ↳ kind of organization that we actually come across—and one that is in force to this day in certain tribes—consists of bands of males; these bands are composed of members with equal rights and are subject to the restrictions of the totemic system, including inheritance through the mother."[2]

Here Freud turns to Robertson Smith's work on the prehistory of monotheism, which offers a detailed account of the totemic social structures that were once widespread in the ancient Mediterranean. Totemic societies share several key features, according to Smith. First, the members of a clan identify with a sacred totem animal who is venerated as their common ancestor and protector, and whose killing is taboo. Second, the inheritance of the totem identity passes through the maternal line. Third, the members of the clan are obliged to seek marital partners outside the totem group. Finally, and most important, the identity of the clan is periodically affirmed and renewed through great festivals that revolve around the ceremonial sacrifice and collective consumption of the totem animal, whose killing is otherwise strictly prohibited. In the earliest surviving accounts of such sacrificial feasts, the ritual is remarkable not only for its extreme cruelty and violence but for the fact that every member of the clan, without exception, is expected to participate in both the slaughter and the consumption of the totem's flesh. Its bloodthirsty character notwithstanding, Smith understands the sacrifice as a means for the clan members to renew the bond with their common ancestor, as well as with one another. As summarized by Freud, Smith concludes that

> the sacrificial animal … might only be killed if all the members of the clan participated in the deed and shared their guilt in the presence of the god, so that the sacred substance could be yielded up and consumed by the clansmen and thus ensure their identity with one another and with the deity. The sacrifice was a sacrament and the sacrificial animal was itself a member of the clan …, by the killing and consuming of which the clansmen renewed and assured their likeness to the god.[3]

The clansmen's festive feelings are therefore due to their having "taken into themselves the sacred life of which the substance of the totem is the vehicle."[4]

For Freud, however, the complex emotions attached to the festival cannot be explained solely by the occasion it provides for identification with the clan's ancestor. This is because the sacrifice is accompanied not only by celebration but by violence, lamentation, and the fear of retribution. Freud then calls up the spectacle of a totem meal of the kind Smith describes, and proceeds to amplify it with "a few probable features":

> The clan is celebrating the ceremonial occasion by the cruel slaughter of its totem animal and is devouring it raw—blood, flesh and bones. The clansmen are there, dressed in the likeness of the totem and imitating it in sound and movement, as though they are seeking to stress their identity with it. Each man is conscious that he is performing an act forbidden to the individual and justifiable only through the participation of the whole clan; nor may anyone absent himself from p. 165 the killing and ↳ the meal. When the deed is done, the slaughtered animal is lamented and bewailed. The mourning is obligatory, imposed by dread of a threatened retribution. As Robertson Smith remarks of an analogous occasion, its chief purpose is to disclaim responsibility for the killing.

> But the mourning is followed by demonstrations of festive rejoicing: every instinct is unfettered and there is license for every kind of gratification. Here we have easy access to an understanding of the nature of festivals in general. A festival is a permitted, or rather an obligatory excess, a solemn breach of a prohibition. It is not that men commit the excesses because they are feeling happy as a result of some injunction they have received. It is rather that excess is of the essence of a festival; the festive feeling is produced by the liberty to do what is as a rule prohibited.
>
> What are we to make, though, of the prelude to this festive joy—the mourning over the death of the animal? If the clansmen rejoice over the killing of the totem—a normally forbidden act—why do they mourn over it as well?[5]

Freud's answer is that the totem animal is in fact a substitute for the father. Seen through this lens, the contradictory behavior of the clan members toward their totem becomes recognizable as nothing other than the "ambivalent emotional attitude [that] to this day characterizes the father-complex in our children and which often persists into adult life."[6] Freud notes that the totemic religion clearly identifies the totem as the clan's common ancestor, as if admitting to its original identity. The totem is not a substitute for just any father, however, but for the all-powerful father of the primitive horde who ruled over the group with savage force.

The primitive horde and totemic society are not merely alternative models of social organization, therefore, but presumed to have a logical or even causal relation, as two successive stages in a single genealogy or development. The question then becomes, how do we get from the first to the second? How does the hierarchical, patriarchal, and authoritarian structure of the original horde come to be replaced over time by the horizontal, egalitarian, and constrained social forms characteristic of totemic societies? Calling the totem meal to his help, Freud infers that "one day the brothers who had been driven out came together, killed and devoured their father and so made an end of the patriarchal horde." The totem feast, mankind's earliest festival, "would thus be a repetition and commemoration of this memorable and criminal deed, which was the beginning of so many things—of social organization, of moral restrictions, and of religion."[7]

As a consequence of this original murder—which Freud assumes to have been repeated many times, in many places, over a great number of years—human society undergoes a series of fundamental transformations. The first and most important is the marginalization of the father's role and the displacement of paternal forms of authority. Working backward from the observed features of totemic societies, Freud infers that the sons, following the murder, adopted a pact that conferred equality upon all of the brothers, but on the condition that none be allowed to replace the primal father at the head of the clan. p. 166 To all appearances, then, patriarchal forms of authority effectively ↳ disappear from the social pact, which is defined by fraternalism and equality. The sacred totem animal is now heralded as the clan's common ancestor, and clan identity is passed down through the maternal line.

It is in this context that the first laws make their appearance, as substitutes for—and as barriers against—the brute force of the primitive father. Here Freud's account might appear to converge with the familiar tenets of social contract theory: the social pact interrupts the "state of nature" by limiting the "law of the strongest" and mediating relations between human beings. The singularity of Freud's account, however, lies in the significance he ascribes to the persistence of the father complex in all its ambivalence.

Freud finds that far from being eliminated from the social pact, the primal father actually persists as a potent psychic imago in and through the new order that purports to put an end to his power. He understands the tenacity of this ambivalent attitude as a consequence not merely of guilt, but of a longing for the father as model and ideal:

> They hated their father, who presented such a formidable obstacle to their craving for power and their sexual desires; but they loved and admired him too. After they had got rid of him, had satisfied their hatred and had put into effect their wish to identify themselves with him, the affection which had all this time been pushed under was bound to make itself felt. It did so in the form of remorse. A sense of guilt made its appearance, which in this instance coincided with the remorse felt by the whole group.[8]

This remorse has three distinct but interrelated outcomes.

First, the father becomes an object of aspiration and a support for identification. Following the murder, therefore, each son internalizes the father in the form of an *ideal ego*, an idealized, aspirational image of the self. This identification is “ambivalent from the very first,” however, since “it can turn into an expression of tenderness as easily as into a wish for someone’s removal.”[9] The idealization of the father manifests itself not only through affection and remorse, therefore, but through the very act of cannibalism that destroys his remains. The latter “becomes comprehensible as a means of assuring one’s identification with the father by incorporating a part of him.”[10]

The ambivalence of identification casts in a new light the “equality” that defines the fraternal pact, revealing that what appears at first as progress, sublimation, and as a triumph of civilized mores over barbarism is in fact founded upon narcissism. While the enforced equality of the fraternal pact nominally prevents any of the brothers from acceding to the father’s exceptional position, it also allows each to fantasize about doing so—and to suspect others of harboring the same ambitions. It is thus the narcissism p. 167 of ↳ each of the sons that founds and perpetuates the fraternal pact, rather than a commitment to non-aggression or mutual respect. Moreover, the brothers are equal to one another only to the extent that each continues to identify (at least unconsciously) with the father: their putative equality is therefore both sustained and undermined by the persistence—in the individual psyche as well as in the collective imagination—of an exceptional position that has only apparently been eliminated. For Freud, therefore, there is a fundamental ambivalence at the heart of any fraternal group. On the one hand it is a true alliance made stronger by the constraints and limits imposed on each of its members, while on the other it is invariably riven by a narcissistic striving and hostility that always threatens to break free of its nominal repression.

A second consequence of the sons’ remorse is that the members of the clan come to regret the loss of the father as the leader and protector of the group, and yearn for the return of a strong authority figure. Under the weight of this regressive wish the father figure does not actually disappear but merely undergoes a series of transformations and distortions. While the powerful totem animal is now heralded as the clan’s sacred ancestor, it is also imbued with manifestly paternal traits and recognizable as an idealized father substitute. In this way the paternal imago not only persists but is rehabilitated to include features that were entirely lacking in the primitive father. The totem is the benefactor and protector of the clan, bestowing preferential treatment upon its members and deploying its strength on their behalf. The totemic system is an attempt at reconciliation with the father, a “covenant” in which each party undertakes to love and respect the other. But it also contains an attempt at self-justification: “If our father had treated us in the way the totem does,” it seems to imply, “we should never have felt tempted to kill him.”[11] The paternal imago expresses not so much a regret for what the sons (and their progeny) lost, therefore, but a yearning for something they never really had. The father at issue here is not the real father who they killed, therefore, but an imaginary father who satisfies all their wishful fantasies.

Finally, the ultimate expression of the sons’ remorse is the creation of the first taboos and prohibitions. While the father was alive, he severely limited his sons’ freedom and frustrated the expression of their sexual instincts. Now we might expect that, the barrier being removed, they would freely enjoy what had previously been off limits. In fact, however, Freud shows the reverse to be true. In accordance with the psychological procedure he calls “deferred obedience,” Freud argues that the sons atoned for their guilt by internalizing the dead father’s authority, prohibiting for themselves what once had been prevented by the father’s actual existence. In this way, writes Freud, “the dead father became stronger than the living one had been.”[12] The first “laws” of the fraternal pact are really just the codification of what the sons take to be the father’s will: the taboo against killing the totem (the father’s substitute), and the ban on any male having sexual relations with the women of the horde, in which Freud sees the origin of the incest p. 168 prohibition. The sons therefore “created out of their filial sense of guilt the two fundamental ↳ taboos of totemism, which for that very reason inevitably corresponded to the two repressed wishes of the Oedipus complex. Whoever contravened those taboos became guilty of the only two crimes with which primitive society concerned itself.”[13]

9.1 The Unconscious Foundations of Law

These distinct but interrelated legacies of the primal murder show the dead father to be very much alive in the minds not only of his sons but of subsequent generations. More broadly, they attest to the profoundly intersubjective character of the psyche, or the fact that “in the individual’s mental life someone else is invariably involved.”[14] Where they differ is that each internalizes the paternal imago in a different way, which determines how the father comes to function as a law for his heirs.

The first case, where the father functions as an ideal or model for each of his sons, involves the psychic mechanism Freud calls *incorporation*. Incorporation can be understood as an attempt to integrate or even consume the object of identification, such that its traits are fully absorbed into the ego. It “behaves like a derivative of the first, oral phase of the organization of the libido, in which the object that we long for and prize is assimilated by eating and is in that way annihilated as such.”[15] The attitude of the cannibal is paradigmatic, since the cannibal does not merely destroy what he consumes but “has a devouring affection for his enemies and only devours people of whom he is fond.”[16] In the same way, the sons who partake of the father’s body seek not only to eradicate his existence but to appropriate his power and strength and to assure their identification with him. Importantly, however, this process is never fully successful. Its incompleteness is attested by the history of totemism, which shows that it became imperative for the heirs of the primal murder “to repeat the crime of patricide again and again in the sacrifice of the totem animal whenever … the cherished fruit of the crime—appropriation of the paternal attributes—threatened to disappear.”[17] Something of the father remains inappropriable, a fact that accounts for the persistence of the father imago and the inevitable elevation of a father substitute.

The third outcome of the son’s remorse, the internalization of the father’s will in the form of the taboo or prohibition, is an example of the modality of identification Freud calls *introjection*. Introjection might be understood as the flip side of incorporation. Whereas the first strives to absorb or assimilate the desired attributes of the object, the second involves the expropriation of the subject by the object it has taken in. Introjection results from the subject being more devoted to the object than it is to its own ego, a situation p. 169 Freud identifies with the overvaluation of the object in love and with the ↳ phenomenon of melancholia. The latter “show[s] us the ego divided, fallen apart into two pieces, one of which rages against the second.”[18] This is because the esteemed object displaces the subject’s *ego ideal*, the critical agency within the ego that is normally responsible for the moral conscience. As a result, writes Freud, “the functions allotted to the ego ideal entirely cease to operate. The criticism exercised by that agency is silent; everything that the object does and asks for is right and blameless. … The whole situation can be completely summarized in the formula: *The object has been put in the place of the ego ideal*.”[19] The introjected object is “extimate” to the ego, at once internal and foreign. In the case of the totemic horde, the sons substitute the father’s will for their “own” judgment and moral conscience. This “father within” is much more powerful than the real father had been, because the ego’s capacity for judgment and critique falls silent before it.

The punishing sense of guilt that pursues the members of the clan long after the father's murder has been forgotten attests to the psychic agency of the *superego*, which Freud identifies with unsatisfied parental demands. Because they cannot be assuaged, these demands give rise to feelings of deficiency and guilt that are passed down from one generation to the next. Psychoanalytic theory underscores the relationship between the superego and the voice, in particular the "inner voice" or "voice of conscience" that is often aligned with the moral law.[20] The voice thus understood is not merely the phenomenological medium of speech, therefore, but a fantasy object. While it is sometimes equated with the subject's "moral compass" or practical reason, it can also be the bearer of cruel injunctions and imperatives of which the subject is not the author. Jacques Lacan describes the voice as an "object fallen from the organ of speech,"[21] the material support of the superego that takes shape in demand: a demand that is more often imputed to the Other of fantasy in the unconscious than expressly enunciated. As one of the four fundamental "objects a" (gaze, voice, breast, feces) around which the fantasy that structures drive circulates, it articulates the subject to the Other without belonging to either. It is intimate yet foreign, uncannily internal to the subject's "own" conscience.

Lacan advances that "the superego is at the same time the law and its destruction."[22] This formulation suggests how the superego and the voice that sustains it might be related to Freud's totemic myth, where the father's demands and injunctions are understood as p. 170 ↳ the animating force of the very law that purports to displace his authority. Expanding upon Lacan's thesis, Mladen Dolar writes:

> In this underside of the law we can hear an echo of the primal father, the shadow of which would always follow and haunt the law. If in Freud's scenario the law was instituted by the murder of the primal father, if it was the law of the dead father, that is, of his name, then the trouble is that the father was never quite dead—he survived as the voice … The voice appears as the part of the father which is not quite dead; it evokes the figure of enjoyment, and thus adumbrates the slide to the destruction of the law based on his name.[23]

Dolar further claims that voice is what distinguishes the superego and its injunctions from the law. If the law must be underpinned by the letter—a letter that is publicly accessible and subject to scrutiny—the voice is more often linked to the transgression of the law. He gives as an example the secret rules and initiatory rituals that hold communities together as a kind of glue, which are invariably articulated by the voice and not written. These rules and rituals are often illegal, or at the very least unable to bear public scrutiny. More important, however, they underscore that the voice is sustained by an "unwritten law," the law of the superego and its often cruel or senseless injunctions.[24]

These different ways of internalizing the paternal imago might seem to be opposed or even mutually exclusive, since it functions variously as an ideal, an all-powerful protector, and as a punishing moral conscience. What unites them, however, is the refusal of responsibility that each enables. More specifically, each implies the erection, in the psyche, of an Other of fantasy who motivates the subject's identifications, takes responsibility for its fate, or is made the ground of law or morality.

Lacan develops Freud's insights by advancing that the human being constructs an "imaginary Other" that it alternately appeals to for help or blames for its suffering. Although its first avatars are the child's own parents, this Other cannot be confused with a specific real person but is instead a psychic representation or fantasy. Lacan first theorizes the Imaginary Other in relation to the "mirror stage," that moment in a child's development when the ego is first constituted through identification with the unified body glimpsed in the mirror, which it takes to be the object of the parent's loving look.[25] Lacan characterizes this first identification as "alienating," inasmuch as it makes the ego dependent upon an external support that is always unstable and illusory, a "mirage" that is forever receding. Despite its pretensions to autonomy and self-mastery, therefore, the ego first comes into being as an object offered up to the Other and sustained by its gaze. Crucially, what matters here is the *structure* of the gaze, and not the "person" to whom it might be attributed within a given situation. The same can be said of Freud’s totemic myth. For while incorporation would seem to eliminate the Other by absorbing its idealized attributes, the implied gaze of the Other p. 171 underwrites the whole scene: to say that ↳ the son takes the father as an ideal is also to say that he aspires to be the object that would please the paternal gaze. More generally, this gaze is implied in the ideals, norms, and models of conduct that guide the ego’s development. These implicitly call upon the subject to act in such a way that the Other, if it witnessed that behavior, would approve.

While the moral law in particular might seem to be something the human subject confronts in solitude, it is in fact deeply intersubjective: the locus of the Other is always implied. The fundamental question then becomes, how does one deal with that intersubjectivity? How does the human being negotiate its relation to the Other? For psychoanalysis, law is one important site of negotiation of this intersubjectivity—and not only the moral law.

When Lacan suggests that the superego is both the law and its destruction, he begs the question: what exactly is meant by “the law”? Implicit in this formulation is the assumption that the superego is the embodiment of one understanding of law (the demands and injunctions attributed to some Other) and the destruction of another (as impersonal limit, as publicly accessible letter, etc.). Drawing on Lacan’s distinction between the imaginary and the symbolic, I have argued that psychoanalysis allows us to identify two different registers of law: *imaginary authority* and *symbolic constraint*.[26]

Law in its “imaginary” dimension posits a lawgiving authority, an Other who is appealed to for help or made responsible. In its symbolic iteration, however, law supposes the decompletion or the lack in the Other, the absence of any ultimate recourse or guarantee. The two are by no means mutually exclusive, of course. Democracy, which ostensibly evacuates the place of the all-powerful Other, is nevertheless haunted throughout its history by a susceptibility to authoritarianism and fascism. In the legal and political spheres, we often see a tension between the evacuation of the place of the Other and the persistent fantasy of some Other who is ultimately responsible. The motto emblazoned upon American currency, “In God we Trust,” typifies this split attitude. While democracy ostensibly empties out the place of the Other by substituting symbolic institutions and practices for sovereign absolutism, it regularly invokes God as the guarantor of justice and morality—and even of the fundamental groundlessness of the economy.

In Freud’s work, the imaginary dimension of law is closely identified with Pauline Christianity, which represents at once the ultimate fruition of the totemic system and the ultimate revenge of the primal father. This is because it heralds the “return of the one and only father deity whose power is unlimited.”[27] Paul’s gospel not only celebrates the resurgence of the deified primal father but offers an indirect acknowledgement of the long-repressed truth of his murder. Importantly, however, this truth comes forward only in the “delusional guise of glad tidings,” according to which the son of God sacrificed himself to redeem mankind from original sin. Since he gave his own life, however, Freud concludes that the sin can p. 172 only have been a murder: “self-sacrifice points back to ↳ blood-guilt. And if this sacrifice of a life brought about atonement with God the Father, the crime to be expiated can only have been the murder of the father.”[28] Christ therefore represents the guilt of each of the sons, a fact confirmed by the fact that he subsequently becomes a universal object of identification for each member of the brotherhood. Even as it offers this ritual atonement for the primal murder, however, Christianity continues to give expression to the totemic logic in all its ambivalence. This is because “the very deed in which the son offered the greatest possible atonement to the father brought him at the same time to the attainment of his wishes *against* the father.”[29] In Paul’s gospel the father takes second place to the son, who stands in his stead just as the sons of the primal horde had longed to do.

Christianity results not in a sublimation of the totemic past, therefore, but a vicious circle of crime and expiation in which one sacrifice always calls for another. Even as the father is killed off again and again, the imaginary Other of fantasy only grows in power. This is true not only of the institutional history of the

Catholic church in particular but of the political-theological monarchies for which it serves as a spiritual justification. Freud observes that the appearance in the social structure of divine kings proves that "the revenge taken by the deposed and restored father was a harsh one," since "the dominance of authority was at its climax."[30] More important, however, Christianity comes to epitomize the dispossessing intersubjectivity at stake in introjection. It postulates that God is literally in our heads, all-seeing and all-knowing, able to judge not only our actions but our most intimate thoughts.

9.2 The Mosaic Law as "Empty Locus"

Law for Freud might well be doomed to being nothing more than a stand-in for the psychic authority of the primal father were it not for the innovation introduced by the law of Moses. The fundamental question it addresses is: how can the human subject can deal with the lack in the Other, the void that opens up at the center of the social pact, without seeking immediately to refuse it or fill it in? In *Moses and Monotheism*, Freud revisits the totemic thesis he elaborated thirty years earlier in *Totem and Taboo*. This time, however, he considers Mosaic monotheism not merely as a continuation of the totemic trajectory but as the first true break with its logic. In essence, his thesis is that the Mosaic religion introduces a fundamental absence or lack there where the totemic structure places the all-powerful father that functions as the ideal ego and superego for each member of the fraternal pact. It therefore requires each subject to pass through the lacking locus of the Other, rather than relying upon identification with—and submission to—an imaginary authority. Among its innovations with respect to earlier forms of law and religious observance, Freud stresses the repudiation of sacrifice and the ban on incarnate manifestations of the deity. Both have the p. 173 effect of evacuating the place of the all-powerful ↳ father and the superegoic character of his "law." The first marks a shift away from ritual practices intended to satisfy the deity's demands, while the second can be read as a break with the totemic foundations of law, or the belief in a law incarnated in a living body.

Moses is a leader who evacuates the place of the leader, by undercutting the logic of identification binding the group and refounding the collective undertaking on a non-imaginary basis. In Lacan's terms, we might say that the key innovation of the Mosaic tradition is the invention of the symbolic dimension of law as distinct from the imaginary. This function is most evident in the first tablet of the Decalogue, which prohibits worshipping idols, making images of God, or invoking the divine name. In consigning God to the place of the unrepresentable, the law allows the collectivity to explore the absence of the leader in a way that promotes subjective freedom and responsibility, rather than blind obedience or surrender to an all-powerful Other. The second and third commandments, which forbid representations of the deity or the speaking of his name, underscore the decompletion of the symbolic, the emptying out of the logical place of the Other that manifests itself as a rupture or breach in the field of representation and as a hole in language. In early Jewish ritual practice this negative space is given form in the Holy of Holies, the innermost sanctum of the Israelite tabernacle. It is associated with the deity not as the site of his manifestation or presence but as a space that must not be entered on pain of death, a "holy hole." In identifying God with a space that cannot be breached or transgressed, the Mosaic law does not simply establish the parameters of religious observance. It also articulates something fundamental about the symbolic function of the law, which in institutionalizing this distance also opens up a space in which the subject—of desire, of freedom, and of responsibility—can come into being.

Lacan's reading of the Mosaic law stresses the primacy it gives to the signifier or speech, whose function is to mediate the subject's relation not only to the object but to the Other. He says of the Ten Commandments that "whether or not we obey them, we still cannot help hearing them—in their indestructible character they prove to be the *very laws of speech*."[31] This is because the condition of speech is "distance between the subject and *das Ding*,"[32] the object posited by the unconscious fantasy as a source of unbearable enjoyment or *jouissance*. In the terms of Freud's analysis of totemism, we could relate it to the voice of the primal father, which persists uncannily within the very social order from which it has been excluded. But we could also relate it to the "things" at stake in the first tablet of the Decalogue: the image, the name, and the presence of God, all of which are rendered inaccessible by the written law and can be approached only from a protective distance. In distancing the Thing, the signifier opens up a space in which the subject can live.

As the "laws of speech," the commandments institute a break not only with every previous understanding of law but also with the "law of the spirit" elaborated in Paul's gospel. They are understood not as mere representations or as placeholders of a force or p. 174 ↳ authority figured as "beyond" the law but as the articulation of a symbolic structure whose spacing or negation of the real undercuts the fantasy of an incarnate law implicit in Paul's gospel. This logic is encapsulated in the fourth commandment, to honor the Sabbath day. According to Lacan, "that suspension, that emptiness, clearly introduces into human life the sign of a gap, a beyond relative to every law of utility."[33] It memorializes or sanctifies God's creation of the world, which paradoxically concludes with the insertion of a gap. In a gloss of Lacan's reading, Julia Lupton and Ken Reinhard observe that the God of Moses "completes the world by subtracting something from it, namely his own activity."[34] He withdraws to create a place where "something is missing," namely, his own full presence.

In privileging the structural function of speech, the Mosaic tradition illustrates the distinction I introduced earlier between *imaginary authority* and *symbolic constraint*. The symbolic dimension of law is manifested in two fundamental ways, the first of which is the formal and structural innovation implied in the advent of written law. Writing is not merely publicly accessible and subject to scrutiny but a barrier or limit to fantasy and the power it holds over us. In substituting the written law for the unlimited authority associated with the father (of which the father's voice might be the ultimate embodiment), the Mosaic tradition makes the father's withdrawal or absence—and thus the quieting or withdrawal of that voice—the condition of the symbolic order of law.

The medieval rabbi Rashi understands the commandments as a protective mediation of the voice of God, whose terrible force they hold at bay. In his commentary of the Decalogue, which is introduced by the verse "and God spoke all of these words [all together" (Exodus 20:1), Rashi suggests that the voice of God took the form of a single, terrifying utterance,[35] so unbearable that the people of Israel begged Moses to shield them from God's voice by speaking the commandments for them, mediating its awesome force.[36] This gloss suggests that Hebraic legalism responds to the superegoic insistence of the voice through recourse to the symbolic limits implied in speech—and writing in particular.

The constrained character of the symbolic is further attested by the introduction of a new avatar of God, which is no longer conceived as a demanding Other to please or obey but as an absent Other who neither compels nor guarantees. This is the upshot of Freud's careful disentanglement of the two gods of Israel, which subsequent traditions p. 175 ↳ have collapsed into a single, composite figure: the bloodthirsty Yahweh of the original Hebrew tribes (a rapacious god of sacrificial demand), and the sublimely distant Aton/Adonai of the Egyptian Moses whose absence confronts the Israelites with the need to take responsibility for justice.[37] One of the core innovations of early Judaism with respect to its antecedents was the shift from ritual human sacrifice to law-based observance, whose biblical prooftext is God's intercession on behalf of Isaac at the moment when Abraham prepares to kill his son. For Lacan, the ban on sacrifice shows the God of Moses to be a God of desire and not demand.[38] Desire differs from demand in confronting the adherents of the religion with a lack in the Other that cannot be satisfied: and thus the necessity of assuming responsibility for their acts.

Lacan develops this argument through a reading of the shofar, the ram's horn whose singular blast is sounded whenever it is a matter of renewing the covenant with God: not only in the historical narratives of the Bible but at festivals of remembrance and solemn moments of judgment.[39] Theodor Reik had previously analyzed the shofar through the lens of totemism, claiming that it represented the voice of the murdered father.[40] Lacan's analysis proceeds in a different direction, arguing that the horn's blast functions to "model the site of our anxiety" with respect to the Other,[41] and thereby presents the voice in an exemplary form that reveals its function as an object of fantasy. What provokes anxiety is that the "voice" is without content; it does not demand or prescribe. As the "affect that corresponds to the desire of the Other," anxiety confronts us with the unknowability of the Other's desire, the lack implicit in the law of the symbolic. In Lacan's reading, the anxiety provoked by this disembodied "voice" presents the Israelites with a choice: are they going to live with the unknowability of God's desire and the responsibility it implies, or will they choose instead to "respond" to the voice, to substantialize it as demand, or even to make sacrifices to it so as not to confront this desire? When he describes sacrifice as a "specific response to the anxiety provoked by the voice as *object a*,"[42] Lacan suggests that the compulsion to sacrifice should be understood not as a demand imposed by an all-powerful God but as a refusal of the lack in the Other that attributes to it an insatiable demand so as not to confront its inconsistency.

p. 176 The rite of circumcision that is demanded of every male who enters into the covenant illustrates very well the novelty of the Israelites' relation to the Other. The act of circumcision is not just a submission to the God's demands but a talismanic protection against them. It is a purely symbolic sacrifice that is ultimately rather modest, and serves to ward off something more radical. A good example is the infamous episode from Exodus, where God, after having called Moses to be his prophet, suddenly decides to kill him. Moses is saved only by the ingenious ruse of his wife Zipporah, who quickly circumcises their infant son and touches the bloody foreskin to Moses's genitals, circumcising him by proxy and so warding off the demonic attack (Exodus 4:24–26). This passage shows circumcision to function as a barrier *against* the deity, which is intimately related to the function of speech as a limit against the Voice. Having verified Moses's circumcision, God is no longer at liberty to strike against the mere mortal who stands helpless before him. As the act that seals the covenant with God, circumcision is not just a demand imposed from without but a pact. Israel's covenant with God is a mutually binding contract, one that commits both parties to certain obligations with respect to one another. In this sense the law limits the satisfaction not only of subject who submits to it but of the deity himself.

By way of contrast we might consider the notion of "sinning in the heart" elaborated in Jesus's Sermon on the Mount (Matthew 5), which holds that to think lustful thoughts about another woman is already to commit adultery, even in the absence of an adulterous act. In this logic, it is no longer possible to fulfill the law simply by avoiding the illicit activity or object. As a result, the law loses its function as a protective barrier. The difference between the two ethics can be illustrated by reference to the commandment against lying, or "bearing false witness." Lacan suggests that this is may be the cruelest commandment of all, because the subject is potentially inseparable from the ability to lie.[43] But if there is a commandment against lying, it is because, in the context of Hebraic law, it is *possible* to lie; in Judaism there is no supposition of divine omniscience. When Jesus introduces the notion of sinning in the heart, and thus the transparency of the heart to God, he suggests that it is no longer possible even to lie. In the process, he lifts the barrier against the deity that is so central to Judaism. The gospel of John asserts that Christ "dwells in us" (John 1:14). While Christian doctrine tends to emphasize the positive side of this cohabitation (the Christian is not alone, is redeemed from his fallen state, etc.), it also introduces an ominous new possibility, markedly absent in Judaism: the subject's radical exposure to invasion by the deity, or the superegoic violence implicit in the intimate relationship between God and man. As Paul says again and again, "I was freed to the law so that I might become a slave to Christ."[44]

When Freud argues that Paul's gospel represents the ultimate culmination of the totemic trajectory, in which the murdered father reasserts his rights by appearing unambiguously as omniscient and omnivoyant, he suggests that the "voice of conscience" resurfaces in Christianity in a particularly invasive form, explicitly identified with divine omnipotence. As Paul's polemic makes clear, it also represents the repeal of
p. 177 law in ↳ its dimension as speech or pact. The resurgence of the imaginary Other of fantasy is expressed as

the reign of “spirit,” whose authority is directly opposed to the function of writing. In Paul’s words, “we no longer serve under the old written law, but under the new law of the spirit” (Romans 7:5–6). At stake is thus an exclusion of the symbolic itself, and more importantly of the structural lack in the Other that it metaphorizes.

9.3 Implications for Modern Theories of Law

Psychoanalytic legal theorist Pierre Legendre elaborates the stakes of these different conceptions of law with respect to Jewish and Talmudic legalism, on the one hand, and Roman and Canon law on the other. In Talmudic tradition law is viewed not as a description of an existing order or a representation of a lawgiving authority but as a text whose meaning is uncertain. Writing is understood not as a more or less transparent medium of communication, the bearer of a message that originates elsewhere, but as a form of inscription that implicates the subject in a process of interpretation determined from the outset as structurally incomplete. Legendre identifies this approach to law with the rite of circumcision, which “becomes for each subject the mark of an interpreter and the proof of his allegiance to the absolute Writing or, in psychoanalytic terms, of the relationship between the human subject and the logical place of the Other.”[45] The Other as logical locus is not *someone* but a purely symbolic Other. (We might identify it with what the Hebrew Bible calls the “covenant,” which binds the human being without any guarantees to a disembodied, absent Other that is manifested only in occasional utterances.) Lacan makes this Other synonymous with language itself, inasmuch as language—as an incomplete system in which a signifier always refers to another signifier, ad infinitum, and not to a signified—is without ground or guarantee. If Legendre aligns this Other with writing, and not speech, it is because the Other is not an interpersonal interlocutor who could be questioned, and who could therefore stabilize meaning or truth, but an absent Other known only by the traces it leaves in human existence. In Jewish legalism, therefore, fidelity to the “absolute Writing” is a fidelity to the letter in its undecidable character, a writing that cannot be completed “spiritually.”

In the diaspora context in which the Talmud originates, there is no privileged mediator or interpreter of the law, no court of last recourse. The object of rabbinic commentary is not to fill this vacuum with an authoritative interpretation that would decide the meaning of the law, however, but to model an approach to religious practice based on the necessity of wrestling with the letter of the text. In the paratactic style of p. 178 Talmudic commentary, many different glosses are presented side by side, without any subordination ↳ or synthesis. In its non-decisionist character, the Jewish interpretation of law foregrounds the decompletion of the symbolic, the absence of a final arbiter—including God himself. This relation to the text is not unique to Judaism, however. Rather, it is an approach to the letter that Legendre identifies with a number of different reading practices, and psychoanalysis in particular. “If there is something fundamentally Jewish about psychoanalysis,” he writes, “it is not for the purely anecdotal reason that Freud happened to be a Jew.” The real link between them is the practice on which Freud’s system of thought is based, namely, “the unraveling of the logic of interpretations that had until then been inscribed in a single legitimating authority, and the signaling of another logic: the play of texts in the space of the unconscious, the space of castration itself.”[46] In both cases, the relationship between writing and the body is understood as the writing of a limit that precludes any full recuperation of meaning or truth. “Castration” implies not only the lack of the object that would fulfill desire but the lack in the Other—the fact that there is no one who can answer, no one who can be held responsible.

In contrast, Legendre argues that the Romano-Canonical legal traditions that form the foundations of Western jurisprudence “are founded in a discourse which denies the essential quality of the relation of the body to writing.”[47] It emerges historically as a repudiation of Jewish legalism and Talmud law. In this shift, one understanding of writing is displaced by another: the material inscription of the letter, as an incommunicable limit or cut that defines the human being’s relation to the Other of language, is supplanted by the fantasy of what Legendre calls a “living writing,” which holds meaning to be lodged in an absolute Other who guarantees all knowledge. Legendre identifies this fantasy with the political theology that emerges out of Roman and Canon law, which considers the emperor as the embodiment of the legal order and the guarantor of meaning. Its logic is expressed by “a fundamental Romano-pontifical maxim: the Emperor carries all the archives in his breast (*omnia scrinia habet in pectore suo*).”[48] The understanding of the emperor or the pope as the “living voice of the law” (*viva vox iuris*) or the “Law that breathes” (*Lex animata*)”[49] suggests that “in the imaginary relation to the place that knows, one person alone is supposed to act on behalf of all the others.”[50]

The theological source of this Roman maxim is Paul’s polemic against the Jewish law in the Epistle to the Romans, which advances that the prescriptive “letter” of the Jewish law must be sublated by the law of the spirit, such that “we serve not under the old written code but in the new life of the Spirit” (Romans 7:6). Christ, as the living embodiment of the law of God, upholds the spirit of the law by “fulfilling”—and so rendering obsolete—its written form. The doctrine of Christ as the “living law” sustains what Legendre p. 179 describes as a “banalization of writing,”[51] a disregard for its material inscription ↳ that holds the letter to be nothing more than a placeholder, a flawed or incomplete representation of a meaning or truth that is itself beyond words. At the same time, it makes possible the legal and political fantasy of a living writing, located in a single body understood as the site of interpretative authority.

In such a perspective, the extraction of a meaning or truth from the intractable letter becomes the ultimate aim of the legal order and the loftiest task of its sovereign interpreter, uniquely charged with animating the dead letter. This notion permeates what Peter Goodrich describes as “the most standard protocols of legal reading,” according to which “it is not the letter but the spirit that determines the meaning of the law”:

> The text is composed of dead letters (*litera mortua*); the rule is no more than a “mute judge,” a sleeping form, requiring the interposition, *anima legis*, of jurist or judge. … [T]he meaning of the law is internal to its living body, *viva vox iuris or lex loquens*, its image, interpreter, or legislator. In classical terms it is spelled out by reference to something beyond words: “to know the law is not to know the words of the law, but its force and power.” In a renaissance formulation we are similarly told that “no words, forms, niceties, or propriety of language is of any regard in the Civil Law, in comparison to truth, faithfulness and integrity. For *verba menti, non verbis servire debet*; words, are made as instruments to serve and express the mind, and not to command it.”[52]

Occidental jurisprudence is born of the assumption that only one can respond, only one can guarantee. It supposes the “telescoping of a human body with the absolute Other, an ultimate Other who guarantees everything, telescoping a body with the divine signifiers, or with God himself.”[53]

While Legendre identifies these assumptions with Roman and Canon law and its early modern iterations, he also insists that the juridical fantasy of a “living writing” is still very much alive today. In his words, “we belong to a culture in which a mystically alienated human body stands in the place of the absolute book. The state has emerged from this structure.”[54] In modern legal theory, this logic is often identified with the work of conservative German jurist Carl Schmitt, whose critique of normative law suggests that there is a “gap” in the law, which renders it incapable of addressing such threats to the legal order as revolution and the general strike. His *Political Theology* offers an account of the sovereign as the one who must on occasion suspend the written law to preserve the legal order, and indeed the existence of the state as such, by acting as the living embodiment of the state to decide on the exception in the absence of legal constraints.

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Notes

1 Sigmund Freud, *Totem and Taboo: Some Points of Agreement Between the Mental Lives of Savages and Neurotics*, trans. and ed. James Strachey (London: Norton, 1950), 175 (hereinafter *Totem*).
2 Ibid., 175.
3 Ibid., 171.
4 Ibid., 175.
5 Ibid., 174.
6 Ibid., 175.
7 Ibid., 176.
8 Ibid., 177–178.
9 Sigmund Freud, *Group Psychology and the Analysis of the Ego*, trans. and ed. James Strachey (London: Norton, 1959), 47 (hereinafter *Group*).
10 Sigmund Freud, *Moses and Monotheism*, trans. Katherine Jones (New York: Vintage Books, 1939), 103 (hereinafter *Moses*).
11 *Totem*, 179.
12 Ibid., 178.
13 Ibid.
14 *Group*, 3.
15 Ibid., 47.
16 Ibid.
17 *Totem*, 179.
18 *Group*, 52.
19 Ibid., 57.
20 Freud stresses that "it is as impossible for the super-ego as for the ego to disclaim its origin from things heard." *The Ego and the Id, The Standard Edition of the Complete Psychological Works of Sigmund Freud*, Vol. XIX, 1923–1925, trans. and ed. James Strachey (London, Hogarth Press, 1961), 51–57. Lacan writes that "the superego, in its intimate imperative, is indeed 'the voice of conscience,' that is, a voice first and foremost, a vocal one at that, and without any authority other than that of being a loud voice." *Écrits*, trans. Bruce Fink (New York: Norton, 2006), 572–573.

21 Lacan, *Television: A Challenge to the Psychoanalytic Establishment*, ed. Joan Copjec, trans. Jeffrey Mehlman (New York: Norton, 190), 87 (hereinafter *Television*).

22 *The Seminar of Jacques Lacan Book I: Freud's Papers on Technique, 1953–1954*, ed. Jacques-Alain Miller, trans. John Forrester (New York: Norton, 1988), 102 (translation modified).

23 Mladen Dolar, *A Voice and Nothing More* (Cambridge, MA: MIT Press, 2006), 101–102.

24 Dolar, *Voice*, 85–100.

25 *Écrits*, 75–81.

26 Tracy McNulty, *Wrestling with the Angel: Experiments in Symbolic Life* (New York: Columbia University Press, 2014).

27 *Moses*, 105.

28 *Totem*, 191.

29 Ibid., 191.

30 Ibid., 186.

31 Jacques Lacan, *The Ethics of Psychoanalysis, 1959–1960*, ed. Jacques-Alain Miller, trans. Dennis Porter (New York: Norton, 1992), 174 (hereinafter *Ethics*).

32 Ibid., 69.

33 Ibid., 81.

34 Kenneth Reinhard and Julia Reinhard Lupton, "Lacan and the Ten Commandments," *Diacritics* 33, no. 2 (2003): 83. 71–97.

35 Moses Maimonides, glossing the same verse, suggests that God's speech lacked distinct phonemes. Cited by S. Y. Agnon, *Present at Sinai: The Giving of the Law*, trans. Michael Swirsky (Philadelphia: Jewish Publication Society, 1994), 260.

36 "Rashi explains that first all the commandments were uttered by God in a single instant. Then, God repeated the first two commandments word for word. Following that, the people were afraid that they could no longer endure the awesome holiness of God's voice and they asked that Moses repeat the remaining eight commandments to them." *Aseres Hadibros, The Ten Commandments: A New Translation with a Commentary Anthologized from Talmudic, Midrashic, and Rabbinic Sources*, ed. Rabbis Nosson Scherman and Meir Zlotowitz (Brooklyn, NY: Artscroll Mesorah, 1981), 23.

37 *Moses*, 39–48.

38 *Television*, 90.

39 *The Seminar of Jacques Lacan Book X: Anxiety*, ed. Jacques-Alain Miller, trans. A.R. Price (Cambridge: Polity Press, 2014), 248 (hereinafter *Anxiety*).

40 Reik's argument is that Moses, who comes down from the mountain glowing with the sublimity of the Father's love, has already killed him. The proof is that in his rage he destroys the Golden Calf, grinds it into a powder, and forces every one of the Israelites to consume it—a meal in which Reik sees the barely disguised traits of the totemic feast. The Golden Calf is thus the totem animal representing the murdered primal father, with the caveat that the representative of the murdered father must originally have been a bull, transformed by distortion into a calf to bury the traces of the crime. Reik finds a further vestige of the totemic murder in the sounding of the shofar. Noting that the Hebrew words that describe its sound contain the root word *zakhor*, "to remember," he suggests that it commemorates the primal murder itself. What we hear in the sound of the ram's horn is nothing other than the lowing of the slaughtered bull, the voice of the dying Yahweh. Cited by Lacan, *Anxiety*, 247.

41 Ibid., 277.

42 *Television*, 85.

43 *Ethics*, 81–82.

44 Romans 6. See also Romans 1:1; 1 Cor. 9:16–18.

45 Pierre Legendre, "The Masters of Law: A Study of the Dogmatic Function," in *Law and the Unconscious: A Legendre Reader*, ed. Peter Goodrich, trans. Peter Goodrich with Alain Pottage and Anton Schütz (London: St. Martin's Press, 1997), 98–133, 110–111 (hereinafter "Masters").

46 Legendre, "Les juifs se livrent à des interprétations incensées: Expertise d'un texte" ["The Jews Indulge in Some Insane Interpretations: Commentary of a Text"], in *La Psychanalyse est-elle une histoire juive?* Colloque de Montpeller, 1980, ed. Adélie et Jean-Jacques Rassial (Paris: Seuil, 1981), 98 (hereinafter "Jews").

47 "Masters," 110.

48 Ibid., 109.

49 "Jews," 105–106.

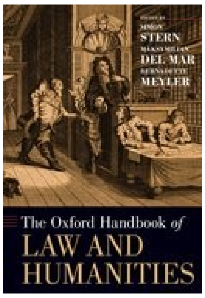
50 "Masters," 111.

51 Ibid.

52 Peter Goodrich, "Translating Legendre, or the Poetical Sermon of a Contemporary Jurist," in *Law and the Postmodern Mind*, ed. Peter Goodrich Gray Carlson (Ann Arbor: University of Michigan Press, 1998), 229–230.

53 "Jews," 99.

54 "Masters" 109.



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CHAPTER

10 Affect and Empathy Studies

Suzanne Keen

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Abstract

This chapter discusses two domains of research into and theorizing about human emotions of interest to legal theorists and practitioners in the law. Written by a non-lawyer with expertise in English literature, narrative theory, and interdisciplinary empathy studies, it offers basic definitions of the terms “empathy” and “affect,” brief overviews of research areas, suggestions about the relevance of affect and empathy studies to law, and cautions about those applications’ limitations and liabilities. By no means prescriptive in intention, this chapter’s discussion of affect and empathy studies lays bare some of the underlying assumptions and critical attitudes of work in differing fields. All varieties of empathy, with their affordances and limitations, are resources for the rhetorical arts of persuasion. Writers and practitioners in the law should alertly consider the roles that empathy and affect play in the law, especially when legal abstractions, doctrines, and documents that evoke strong feelings are accorded the imaginative status of persons by means of *Einfühlung*.

Keywords: altruism, Affect, Einfühlung, Emotion, Empathy, Intersubjectivity, Persuasion, Reception, rhetoric

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10.1 Affect Studies and Empathy Studies

THIS chapter discusses two domains of research into and theorizing about human emotions which may be of interest to legal theorists and practitioners in the law. Written by a non-lawyer with expertise in English literature, narrative theory, and interdisciplinary empathy studies, it offers basic definitions of terms, brief overviews of research areas, suggestions about the relevance of affect and empathy studies to law,[1] and cautions about those applications' limitations and liabilities. By no means prescriptive in intention, this discussion of affect and empathy studies seeks to lay bare some of the underlying assumptions and critical attitudes of work in these differing fields, so that a legal reader might navigate the burgeoning literature in affect studies and empathy studies with some awareness of the key differences in emphasis.

Both areas possess interdisciplinary reach, arising from theories and empirical study in social sciences, humanities, and (in the case of empathy) cognitive science and social neuroscience. Affect studies has the greatest purchase for humanists who share commitments to psychoanalysis or social constructionist views arising from the sociology of knowledge—that is, the belief that human behavior and identity are best understood as socially situated, and that knowledge comes from interaction with others.[2] Whether affect itself is innate or relational depends on your source, for to a constructivist there are few, if any, inborn aspects of human nature. However, some affect theorists following p. 182 ↳ Silvan Tomkins would see human emotions as part of an evolved system of motivation,[3] though they would still see affects, as Ruth Leys puts it, as "only contingently related to objects in the world."[4] Empathy studies as it interacts with the humanities (particularly in philosophy and literary studies) also has an interest in intersubjectivity (sharing between/of the minds of subjects who are inherently social creatures), but due to its conversation with social neuroscience and cognitive science, empathy studies tends to rely on the following ideas: that at least some limited set of basic human emotions exist independent of cultural differences; that our brains and those of other primates possess a neural manifold for shared intersubjective perceptions (mirror neurons); that human consciousness derives some predictable features from our embodied nature; and that emotion-sharing and mind-reading among humans can occur with a reliable degree of empathic accuracy.[5]

Though scholars in the area of empathy studies give credence to psychological and neuroscientific emotion science that their peers in affect studies might discount, there are similarities and overlaps between these disparate approaches. This means that the terms of discussion occur with different emphases in each realm. Both center on emotional experiences, and neither waves away emotion as entirely inimical to reason or cognition. Both involve forms of idealism—about interpersonal empathy and altruism on the one hand, or about political or social reorganization or other utopian potentialities, on the other hand—and both exhibit skepticism about the efficacy of empathy as a driver of moral or prosocial action. Despite these points of commonality, affect studies and empathy studies researchers are relatively infrequently found in conversation with one another, and their differences are marked. They belong to separate intellectual traditions, and rare are the migrations from one camp to the other.

For the most part affect studies pays no mind to emotion science outside the psychoanalytic tradition, and there are only a few efforts on the part of cognitive studies to grapple with the ideas of affect theorists. Patrick Colm Hogan describes the state of affairs accurately:

> There are critics and theorists who draw on both traditions equally (as in Donald Wehrs's use of sources ranging from Julia Kristeva's poststructural psychoanalysis to Antonio Damasio's neuroscience). Moreover, a number of writers associated with affect theory make selective use of affective science, while critics associated with affective science have taken up political and cultural topics. There is nonetheless a broad tendency toward a bifurcation of this sort. For example, the *Affect Theory Reader* includes no index entries for such towering affective science researchers as Antonio Damasio, Nico Frijda, Joseph LeDoux, Keith Oatley, or Jaak Panksepp. In p. 183 ↳ contrast, there

> are particularly numerous index entries for Gilles Deleuze, Lawrence Grossberg, Félix Guattari, and Brian Massumi, who do not appear at all in a work such as *The Oxford Companion to Emotion and the Affective Sciences*. Even a figure such as Michel Foucault, prominent in *The Affect Theory Reader*, has only a very limited presence in *The Oxford Companion*.[6]

Because of the lack of conversation between the two areas, it is more helpful to think of degrees of commonality than agreement; disagreements stem from the deep distinctions in philosophical underpinnings (mainly concerning constructivist versus universalizing beliefs about human nature) rather than from (much) overt argument.

A sampling of areas of difference include the intra-philosophical debates about the status of fictional emotions (known as the paradox of fictional emotions); the moral sentimental view that empathy leads to altruism, prosocial actions, and good world citizenship (or its skeptical confutation with reference to the disappointments of history); the argument that all forms of shared emotion (including literary empathy) are inefficacious when false empathy, failed empathy, and personal distress intervene (vs. the insistence on a shared psychobiological humanity); and the implications of gender and other aspects of readers' intersectional identities on both affect and emotion (in which difference is either a barrier or an invitation to solidarity with outgroups). In interdisciplinary conversations about empathy, misunderstandings are rife, and they usually stem from the phenomenon of shared vocabulary that masks different political and philosophical commitments. The various ideas circulating about the importance, usefulness, dangers, or lamentable dearth of empathy in contemporary society suffer from similar obscurations ironically caused by shared vocabulary. In both affect and empathy studies, a wide array of stances toward empathy can be discovered, concerning its desirability or undesirability, its cultivation through exposure to literature or its resistance to educative processes, its relation to prosocial action on behalf of others[7] and morality,[8] or to unjust allocation of resources,[9] and its efficacy or its failures (among other controversies).

Though a chapter of this length cannot delve into all these areas of contention, it does focus on questions and hypotheses of the greatest likely interest to lawyers and legal scholars. As the following discussion of p. 184 definitions of terms will shortly reveal, there is a ↳ great deal of variation even among researchers who believe, for example, in the positive possibility of empathy, in the way they define it, theorize about it, and study it empirically. Theorists employing both approaches—affect studies and empathy studies—have entered into conversation with legal studies, but from very different angles and to disparate ends. While on the one hand theorists of affect often have intellectual commitments that align with Critical Legal Studies (CLS), analyzing manifestations (often nonverbal) of subjective experiences within existing power structures in a fashion that may question the norms, forms, and politics of institutions, on the other hand advocates for the cultivation of empathy more often contribute ideas relevant to practitioners seeking to sway jurors through the arts of persuasion, to combat criminal recidivism through educational interventions, or to advocate for reparations for victims or clemency for perpetrators who have themselves been victims of earlier abuse.

Unfortunately, the ordinary words that both approaches employ—affect, emotion, empathy, sympathy, compassion,[10] altruism, and their many common synonyms—have specific valences within their critical arenas that could unintentionally evoke, just to suggest a few of the myriad possibilities, moral sentimental assumptions (as for instance when empathy is linked to altruism), psychoanalytic principles (e.g., when using "affect" signals an allegiance to Silvan Tomkins's ideas about resonance in communication[11]), or Marxist critiques of hierarchical authority, political structures, or institutions. One might easily use a term that has an everyday meaning, and run headlong into resistance that arises from a commitment or belief based in one, but not all, of these arenas. For example, some scholars firmly believe that "altruism" does not exist, or has pathological impacts[12]; others find "sympathy" unacceptably condescending; "empathy" may be regarded negatively as the cause of drive-by feeling or ill-informed projection; "compassion" itself may be invoked only to lament its inevitable fatigue; "emotion" may suggest the absence of reason or the very basis of cognition depending on the audience.

10.2 Affect and Emotion

The first term, the noun "affect," has a scientific valence that distinguishes it from ordinary terminology of feelings, emotions, and moods, as well as from the usual (verb) meaning in a legal context: bear upon, cause to alter or vary, change, conduce, exert influence, impress, or induce.[13] Although in the field of psychology, p. 185 "affect" indicates an ↳ instinctive response to a stimulus that evokes a feeling or an emotion in a subject, in affect theory an "affect" is not synonymous with a personal feeling. An influential affect theorist, Brain Massumi, writes in his gloss on Deleuze and Guattari, "L'affect (Spinoza's *affectus*) is an ability to affect and be affected. It is a prepersonal intensity corresponding to the passage from one experiential state of the body to another and implying an augmentation or diminution in that body's capacity to act. *L'affection* (Spinoza's *affectio*) is each such state considered as an encounter between the affected body and a second, affecting, body."[14] As Eric Shouse lays out the distinctions, "Feelings are *personal* and *biographical*, emotions are *social*, and affects are *prepersonal*."[15] The definition of "affect" in affect theory is complicated by the fact that its seminal usage by Spinoza is often glossed as synonymous with (and is translated from his Latin *affectus* as) "emotion," conflating what subsequent commentators have sought to distinguish, as they seek to understand aspects of experience that cannot readily be accounted for using dominant forms of representation. In psychological science, however, "affective" studies indicate a complement to cognitive studies, and they do concern the emotions. For affective scientists, the "affect" under study includes "a class or category of mental states that includes emotions, moods, attitudes, interpersonal stances, and affect dispositions."[16]

Using the term "emotion" does not necessarily indicate an intellectual allegiance to emotion science, however. Some prominent affect theorists, such as Sara Ahmed, eschew the term "affect" in favor of "emotion."[17] For Ahmed, the move to "emotion" does not enable the universalizing move of identifying core or basic emotion sets but instead authorizes a historicizing approach that considers context:

> I actually wanted to disrupt the idea of emotion coming from within and then moving out towards objects and others. … What was interesting to me was not just how is the body affecting and being affected, but how is it that certain kinds of things are given value over time? Affects tended to be used a little bit too much at the level of an encounter between bodies. I wanted to talk about histories that preceded and directed this encounter and emotion, as a word, let me do that.[18]

Clearly, emotion in Ahmed's sense has very little in common with the six or eight basic emotions theorized p. 186 in psychological science (such as Robert Plutchik's fear, anger, ↳ sadness, joy, disgust, surprise, trust, and anticipation).[19] Ahmed's emotion instead belongs in the tradition of Raymond Williams's description "structures of feeling," or "meanings and values as they are actually lived and felt"[20] which can be discerned in residual, dominant, and emergent forms.[21] In Ahmed's conception, emotion does not indicate one of a fixed set of basic emotions. Instead, emotion places bodies inside or outside communities and forges social relationships of inclusion or exclusion: "emotions align some bodies with others, as well as stick different figures together, by the way they move us."[22] This kind of emotion is both contextual and ideological. In this, Ahmed sees emotionally charged naming in an Althusserian light, where, for example, a victim of hate-speech is interpellated as one who is hated: "the important question is: What effects do such encounters have on the bodies of others who become transformed into objects of hate?"[23] Given these highly relevant impacts, affect theory should be of interest to legal theorists, and perhaps also to practitioners concerned with both the flow of emotion as a regulatory force that shapes our experiences of culture, institutions, and processes (including the law), and with the potential damage inflicted on targets of repetitive or systemic emotion-driven exclusion or denigration. Employing affect theory may provide a way of bringing to light the centrality of emotional experience to all lived experience, and not only as a driver of bias, imperfect perceptions, or motivation to harm. Less clear is how precisely legal theory could usefully take up these contested terms from affect theory, given their strong ordinary meanings in everyday language.

This foray into defining two evidently contested concepts, affect and emotion, shows that profound disagreements about the location, dynamics, innateness, and shaping by culture of both affect and emotion exist, even among the most commonly cited affect theorists. This derives in part from their multiple and diverse intellectual allegiances. According to Patrick Colm Hogan,

> Writers in affect theory draw on a range of psychological, social, linguistic, and other theories, most often in the service of political analysis. The psychological principles of affect theory have tended to derive from the tradition of psychoanalysis, often through its radical revision or critique by such theorists as Jacques Lacan and Gilles Deleuze. Affect theorists have also drawn extensively, sometimes more centrally, on a range of theorists outside of psychology, principally poststructuralists, such as Michel Foucault and Jacques Derrida.[24]

When it comes to empathy studies, we must once again straddle separate arenas. Most empirical empathy research (since the 1980s) has been done by psychologists, in developmental, social, and cognitive p. 187 psychology: C. Daniel Batson, Nancy Eisenberg, ↳ Martin Hoffman, and William Ickes led the way. The related interdisciplinary field of social neuroscience has had a profound impact on our understanding of empathy, especially after the discovery of mirror neurons in humans.[25] This work shows that a physiological substrate for aspects of human empathy exists, but it does not guarantee that activation of a mirroring response in the neurons of an observer leads to the higher-order cognitive operations involved in mature empathic concern. This biological substrate is referred to as a shared manifold for intersubjectivity[26]; it offers a potentiality for understanding, not an inevitability of fellow feeling or compassion. The puzzle of how our shared emotional responses with others sometimes do (and sometimes *do not*) lead to concern and altruism has interested philosophers since the eighteenth century.[27] Indeed, the behaviors involved in motor mimicry, imitation in learning, emotional contagion, and facial and bodily mirroring that can now be attributed in part to a mirror neuron system had been observed and written about centuries earlier, under the label of sympathy.[28] Adam Smith and David Hume also noticed the limitations imposed by barriers of distance and dissimilarity on the human expression of sympathy.

Affect theory sustains two major ways of thinking about empathy. The early psychoanalytical writers adopted the early-twentieth-century formulation of *Einfühlung* from German psychological aesthetics. Variants of empathy persist throughout psychoanalytical theory and contribute a strand to affect theory, as for example in Silvan Tomkins's terms, the experience of "affective resonance."[29] Mühlhoff glosses affective resonance as "a dynamical entanglement of moving and being-moved in relation, of affecting and being-affected, which is sensitive and specific to the concrete relational and situational configuration."[30] Though he does not use the language of intersubjectivity, Tomkins's affective resonance emphasizes that "the interaction dynamic itself creates an affective experience rather than transmitting internal feeling states between pre-existent individuals. This leads to a philosophical framework in which relationality and ontogeny are primary over separate individuals, and in which the naturalistic distinction of a fundamental physical level versus an emerging level of social processes has to be given up."[31] Though this emphasis p. 188 distances Tomkins's thinking from any kind of innate physiological ↳ substrate, Paul Ekman himself testified to the importance of Tomkins's 1964 work on the face as a fast, visible instrument that informs both others and the experiencing subject about the emotions.[32] The second strand of thought about empathy within affect studies derives from cultural studies a deep distrust of any human universals, including universals of biology and innate nature. In its most neutral form, this critique rests on historicist assumptions, arguing, as historian of the emotions Ute Frevert does, that empathy is a modern, global, recent arrival, no more universal than out-of-favor emotions, such as honor and shame, that were more highly valued and motivating in the past.[33] In its most critical form, empathy is suspected for imposing (likely) unjustified beliefs about others' feelings and point of view on them, in an imperious move that mimics the power structures of colonialism and racism. By this point it should be clear that what various commentators point to when they either excoriate or exult empathy may be referring to wildly different concepts, or to different aspects of the group of phenomena that fall under the term “empathy.”

10.3 Empathy

In ordinary English empathy normally means the experience of sharing a feeling *with* another person. It is usually differentiated from sympathy (feeling an appropriate, congruent emotion *for* another), though in the eighteenth century, influential treatments of sympathy by Adam Smith and David Hume clearly included empathic phenomena.[34] In contemporary parlance, empathy is commonly understood as a beneficent moral emotion leading to good citizenship,[35] but most scientists regard empathy as an evolved capacity that benefits human survival through mutual comprehension (including the recognition of malign intentions) that aids in successful competition for resources, through fostering of nurture,[36] and in cross-species p. 189 perceptions that help hunters ↳ succeed in killing prey animals.[37] As John Sarnecki writes in “The Emergence of Empathy in the Context of Cross-Species Mind Reading,” “A univocal definition of empathy has been notoriously difficult to pin down, but scholars typically use the term to describe shared affective or cognitive states, compassion or feeling for the distress of others, and/or imagining one's self in another's place in order to understand his or her cognitive, volitional, and affective states. … On this account, empathy allows humans to take on or imagine another individual's experiences, thoughts, drives, as well as his or her emotional responses and commitments.”[38] This version of empathy incorporates most of the elements commonly attributed to the motivation, operation, and results of empathy, without limiting them to a human-to-human transaction.

Just as “affect” and “emotion” signal varying assumptions depending on the context of their usage, empathy also means different things to researchers in psychology, philosophy, and the helping professions. In his very useful article, psychologist and empathy authority C. Daniel Batson outlines a set of concepts that relate to quite different research programs in empathy studies. Concept 1, “Knowing Another Person's Internal State, Including His or Her Thoughts and Feelings,” emphasizes cognitive empathy and empathic accuracy.[39] This version of empathy may be at play whenever depositions or testimony allow a subject to explain basic things about events and circumstances. Knowing what has happened, and hearing about it from the person who knows first-hand, encourages her audience to assume they know how she feels. However, as Batson acknowledges, empathic accuracy has its limits: “you could be wrong, at least about some nuances and details.”[40] Concept 2, “Adopting the Posture or Matching the Neural Responses of an Observed Other,” refers to facial empathy or motor mimicry.[41] It is understood to be automatic, but Batson cautions against making perception-action matching a unifying basis of all empathy: “neither humans nor other species mimic all actions of others. To find oneself tensing and twisting when watching someone balance on a tightrope is a familiar experience; it is hard to resist. Yet we may watch someone file papers with little inclination to mimic the action.”[42] Batson's Concept 3, “Coming to Feel as Another Person Feels,”[43] explains emotional contagion, and from a neuroscience perspective, relies on humans' shared manifold for intersubjectivity.[44] Smith and Hume observed emotion-matching and emotion-catching, forms of affective empathy, and wrote about them under discussions of sympathy. Their observations influenced the moral-sentimental account of sympathy (and later empathy) as a moral emotion that can be cultivated through exposure to imaginative literature. As a goal of fictive representation, sympathy has had p. 190 a prominent ↳ role to play in literature, with important statements in its favor by Henry Home, Lord Kames, Percy Bysshe Shelley, and George Eliot.[45]

Batson's Concept 4, "Intuiting or Projecting Oneself into Another's Situation," is the oldest concept associated with the term "empathy" specifically, as it refers to the phenomenon theorized by German psychological aesthetics at the beginning of the twentieth century, *Einfühlung*.[46] Imaginative projection into an inanimate object, such as a tumbleweed being blown across a highway, has also been theorized as an aspect of response to artworks, under the label of aesthetic empathy. Acknowledging that *Einfühlung* still has purchase in philosophical discussion of empathy[47] (and he might have added, in literary applications), Batson clarifies that psychologists rarely mean *Einfühlung*'s projection into another when they refer to empathy.[48] Because Freud uses the term *Einfühlung*,[49] this version of empathy does turn up in Affect Studies. *Einfühlung* plays a role in reading when we attribute personalities, moods, and feelings to inanimate objects, fictional worlds, and characters. If this seems fanciful, it has long been understood as contributing to the human imagination, including in Freud's references to it as part of creative daydreaming.[50] In literary reading, a version of *Einfühlung* may be involved in familiar phenomena: mental visualizing of spaces and movement in spaces; projection into inanimate objects and forms; indulgence in the emotional illogic of the pathetic fallacy; personification of things and landscapes; anthropomorphizing animals and natural forces; and identification with the furnishings of fictional worlds.

Einfühlung for abstract legal principles and inanimate objects such as the Constitution should interest legal scholars. The articulation of *Einfühlung* (and empathy) as concepts separate from sympathy in psychology and aesthetics[51] occurred during the late nineteenth and early twentieth centuries. In German aesthetics, *Einfühlung* describes viewers' imaginative transport "into" the object, giving life to inanimate things. The spectator relates to the object analogously to the way people relate to other people, but in the late nineteenth century, *Einfühlung* had not yet acquired its meaning as a description of emotional attachment to other people. By 1913 Vernon Lee had adopted Lipps' "empathy" for *Einfühlung*, following Titchener's coinage of empathy as a translation of *Einfühlung* that chimed with but distinguished the concept from p. 191 sympathy.[52] Informed by the experimental psychology of Titchener and the aesthetic psychology of ↳ Theodor Lipps,[53] Vernon Lee's book *The Beautiful: An Introduction to Psychological Aesthetics* (1913) solidified the place of empathy (*Einfühlung*) in English-language theories of aesthetic response.[54] Lee was especially concerned about explaining human responses to the inanimate world, in embodied responses to images, space, things, or built environments. Early twentieth-century theorists of literary empathy showed how Romantic poets conveyed oneness with nature by projecting feelings into insensate objects.[55]

Whenever a contract is broken, a law violated, a constitutional crisis provoked, *Einfühlung* embedded in the idioms of the language itself evokes concerned emotional projection into abstractions that take on temporary bodies subject to vivid injuries. Passionate defenses of principles and documents held to be foundational to our legal systems often evoke *Einfühlung*. For instance, *Einfühlung* for the rule of law permeates Elaine Scarry's *Rule of Law, Misrule of Men* (2010).[56] As Scarry's work illustrates, arguments imbued with *Einfühlung* for honored texts (such as the Department of Defense's Law of War Manual or the Geneva Convention) and abstractions (such as "the rule of law" or "justice") are also often political. They can be wielded by originalists, proponents of natural law, and defenders of traditional morality. All varieties of empathy, with their affordances and limitations, are resources for the rhetorical arts of persuasion. This encourages the view that writers and practitioners in the law should alertly consider the roles that empathy and affect play in the law, especially when legal abstractions, doctrines, and documents that evoke strong feelings are accorded the imaginative status of persons by means of *Einfühlung*. Batson's dismissive treatment of *Einfühlung* under Concept 4 should not dissuade legal theorists from considering it.

Batson's Concept 5, "Imagining How Another Is Thinking and Feeling," matters to philosophers of mind[57] and psychologists interested in perspective-taking, and Theory of Mind (ToM).[58] Though some believe it is identical to Concept 5, Batson differentiates Concept 6, "Imagining How One Would Think and Feel in the Other's Place," as role-taking, or putting oneself in the shoes of another.[59] No lawyer can read that phrase without thinking of Atticus Finch's words: "You never really understand a person until you consider things from his point of view […] until you climb into his skin and walk around in it."[60] Since we can never actually climb into another's skin literally (for which reason a softer version of the metaphor substitutes "shoes"), the distinction between perspective-taking and role-taking does matter. Both are versions of cognitive p. 192 empathy, ↳ but in perspective-taking, the empathizer imagines the other. I know that my husband has poor night vision, so I imagine his straining to see as he drives, an effort that might trigger some anxiety in him. I am imagining him and his extra-alert and worried feelings. In role-taking, the empathizer imagines how he or she would feel in the situation of the other. What if I were behind the wheel? I have good night vision! No worries! How I would feel driving at night differs from how he feels. I don't need his glasses, with a prescription that does not correct his vision all the way to 20-20. I may share his extra-alert state but not his anxiety. Arguably, successful role-taking empathy is more effortful and more egotistical. Some theorists regard this form of empathy as more "categorical," more dependent on matches with the self and group identity, and therefore less other-directed and less likely to lead to the ethical expression of compassion than the situational focus of perspective-taking empathy.[61] Indeed, role-taking as an imaginative exercise may lead to impatience or incredulity rather than sympathy if one's own imagined responses to being in other's places differ from the response they show or report. To complicate matters further, some philosophers feel quite strongly that perspective-taking is just as egotistical in its operation as role-taking, and that since only a self can perceive another, the results of an imagine-other instruction would never differ from an imagine-self instruction.[62] As a habitual novel reader I disagree with this, for I have learned through my lifetime of fiction reading to imagine others quite unlike myself. Thus I consider Batson's treatment of the two related phenomena as offering a useful distinction, one that matters in the rhetoric of persuasion.

Concept 7, "Feeling Distress at Witnessing Another Person's Suffering," indicates an empathic response of personal distress, which usually causes aversion from the suffering subject.[63] It is egotistical rather than other-directed, for it involves "feeling distressed by the state of the other."[64] In the psychological literature, personal distress responses are among the culprits for inaction or lack of sympathetic concern. Why do bystanders not intervene when they witness something going wrong? Possibly they are experiencing the phenomenon of diffusion of responsibility, where they assume others in the crowd (surely!) have already called the police, or an ambulance, or posted the video on social media. This isn't a failure of empathy but a failure to intervene. Possibly they are not feeling empathy for the victim at all, since categorical differences might prevent fellow feeling from occurring in the first place. A third possibility lies in personal distress. Unresponsive witnesses may simply be overwhelmed and even incapacitated by their empathic distress, which can even trigger traumatic flashbacks if they have been victims of similar misfortunes. The important thing to grasp about personal distress is that although it is a real and unruly kind of empathic response, it does not lead to sympathy, altruism, or positive shifts in attitudes like other forms of empathy. It leads to aversion and disengagement. Invoking it may be counterproductive in an advocacy context.

p. 193 Batson's Concept 8, "Feeling for Another Person Who Is Suffering," is what remains of the capacious category of sympathy, winnowed down from the eighteenth-century concept discussed by Adam Smith and David Hume.[65] It differs from contemporary understandings of empathy because it includes congruent emotions, not the matched or shared feelings of Concepts 1–3 and 5–6. As Batson puts it "empathic concern" is "felt *for* the other"[66] and its congruence "refers to the valence of the emotion—positive when the perceived welfare of the other is positive, negative when the perceived welfare is negative."[67] As Batson points out, feeling an appropriate (but different) other-oriented emotion has been identified by many names in earlier times, answering to pity, compassion, sympathetic distress, and sympathy. In my opinion much of the hope that cultural commentators place in empathy would be better invested in the cultivation of the sympathetic imagination. To feel concerned for a traumatized victim is probably a more useful state of mind than a full-blown empathic sharing of trauma, which could be incapacitating and might well lead to personal distress rather than efficacious decision-making or action on behalf of the other.

Empathy has its critics, from Edith Stein to Richard Delgado.[68] Its limitation due to bias in the perceiver, responding to dissimilarity, unfamiliarity, or distance, makes it unreliable. Paul Bloom has criticized the "spotlight effect" of empathy,[69] in a critique related to Jesse Prinz's view that empathy roused for one individual or group can lead to unjust reactions or may lead to antipathy or even dehumanization of an outgroup as a result of empathy for an ingroup.[70] Among literary critics, postcolonial literary theorists emphasize the liabilities of universalizing to critique assumptions of biologically based accounts of human emotions that occlude differences.[71] Critics of empathy divide on whether its most baleful effect is false empathy or failed empathy.[72]

10.4 Narrative Empathy

Batson's discussion of empathy omits not only discussion of its critics but also an important kind of empathy that has a bearing on legal applications. He leaves out what developmental psychologist Mark Davis measures as "fantasy empathy,"[73] a variety of p. 194 ↳ which I theorize as "narrative empathy."[74] The influential four-subscale empathy survey devised by Mark Davis, the Interpersonal Reactivity Index (IRI),[75] is an instrument used to gauge levels of and changes in empathy among human subjects. It includes a concept of fantasy empathy, "Imagining oneself in the place of *fictitious* characters appearing in books, movies, and plays."[76] Empathy studies in the humanities has taken a special interest in theorizing narrative empathy. Philosophers have led the investigation of the status of fictional emotions.[77] Not all narrative is fictional, however, and it is in this sense that the theory of narrative empathy, as elaborated in rhetorical narratology, may be of special use to the law. The rhetoric of narrative has a central role to play in the presentation of information in cases and in advocacy. Indeed, according to the *Oxford English Dictionary*, the word "narrative" enters into the English language (from the prevalent Latin *narratio*) through Scottish legal practice, meaning "1. a. A part of a legal document which contains a statement of alleged or relevant facts closely connected with the matter or purpose of the document; spec. a statement of the parties to a deed and the cause of its granting" or "1. b. An allegation made as the basis of a legal action," or "2. a. An account of a series of events, facts, etc., given in order and with the establishing of connections between them; a narration, a story, an account," with examples of all three uses dating back to the sixteenth century. Not until the mid-nineteenth century does narrative begin to be used in the literary sense, as "The part of a text, esp. a work of fiction, which represents the sequence of events, as distinguished from that dealing with dialogue, description, etc.; narration as a literary method or genre."[78]

Working within the tradition of rhetorical narratology, in a theory informed by cognitive and affective science, I define narrative empathy as

> the sharing of feeling and perspective-taking induced by reading, viewing, hearing, or imagining narratives of another's situation and condition. Narrative empathy plays a role in the aesthetics of production when authors experience it (Taylor et al. 2002–2003: 361, 376–77), in mental simulation during reading, in the aesthetics of reception when readers experience it, and in the narrative poetics of texts when formal strategies invite it. Narrative empathy overarches narratological categories, involving actants, narrative situation, matters of pace and duration, and storyworld features such as settings. The diversity of the narratological concepts involved (addressed in more detail below) suggests that narrative empathy should not simply p. 195 ↳ be equated with character identification nor exclusively verified by readers' reports of identification. (Character identification may invite narrative empathy; alternatively, spontaneous empathy with a fictional character may precede identification; Keen 2007: 169.) Empathetic effects of narrative have been theorized by literary critics, philosophers, and psychologists, and they have been evaluated by means of experiments in discourse processing, empirical approaches to narrative impact, and through introspection.[79]

The intersections of narrative empathy with empathy as it may be involved in law and or legal discourse are manifold, especially when regarded in a rhetorical communication framework.

10.5 Empathy and the Law

Though dispassion and critical distance may prevail as ideals, many opportunities to share awareness of and feelings with another's situation and condition occur in the course of interactions in and around the law. The creative work of writing involves imagining an audience that one hopes to persuade. The aesthetics of production of legal writing emphasize clarity and concision, but a fine legal writer may succeed in part because of an ability to marshal empathy in the writing process. Reading depositions, hearing testimony, and rehearsing witnesses involves mental simulation not only of the narrated events but of the second-order representation of what imagined future audiences would think of the story. The aesthetics of reception can involve empathy (including personal distress) of jurors as auditors, and judges as readers, regardless of instructions about fairness. The concern that empathy and emotional responses generally are involved in unjust outcomes is involved in the Brechtian commitment to an estrangement-effect (V-Effekt).[80]

What techniques of narration, practitioners may reasonably inquire of narratology, most reliably invoke empathy or encourage a less emotionally charged mode of reception? The narratological categories of imaginative literature share with legal narration actants, narrative situations, pace, duration, and settings. All of these may be harnessed to evoke or impede empathetic engagement. Fictional characters and the represented persons of narrative non-fiction are perhaps the most potent formal features of narrative with respect to evocation of empathy. Though the persons of legal narratives may not reveal the rich interiority of many fictional characters, the techniques of characterization employed to describe and reveal their identity, actions, speech, and motives are not formally distinctive: they work the same way, often through metonymic shorthand that operates by inviting associations ("He was wearing a hoodie").

p. 196 Empathy for persons is an aspect of persuasive rhetoric, because human beings both make and receive the communications crafted to sway their decisions. Because character identification may ensue from or invite empathy, understanding what aspects of intersectional identity[81] or shared life experience may trigger empathy is obviously a concern for lawyers involved in jury selection.[82] Even judges trained in dispassionate analysis have the same shared manifold for intersubjectivity as any other human being, so they may have to learn to discipline empathetic responses. This effort may mitigate "spotlight effects"[83] or risks of unjust allocation, but it is unlikely that it stops the involvement of empathy entirely. Throughout the communication chain, people's emotional engagement with those who communicate with them, and with the persons depicted in the narration (whether agents in a dispute, injured parties, or perpetrators), occurs to varying degrees. During the sentencing phase of a death-penalty trial, Scott Sundby has argued, advocates may succeed in getting a life sentence rather than a capital decision for a convicted criminal by narrating his life circumstances in a fashion calculated to evoke empathy.[84] Alternative sentencing programs intended to combat criminal recidivism among non-violent offenders harness the experience of narrative empathy felt in reading and discussing imaginative literature to the project of rehabilitation. The Changing Lives Through Literature (CLTL) program, for example, uses a syllabus of literary reading and discussion (including the judge and parole officer as well as the offenders) to cultivate empathy:

> Individuals who read about characters in literature may find a connection between themselves and those characters. If literature is a regular companion in our lives, this is not news. But, many adults and youth do not have access to literature and its transformative nature. CLTL participants, judges, probation officers, and instructors believe that bringing carefully selected works of literature to

> criminal offenders may help these men and women gain insight into their lives and behavior, and learning that they are not alone with their problems.[85]

Though it is not clear which elements of the CLTL philosophy drive their results, studies have shown that the course of reading and discussion, which blends role-taking and perspective-taking, does reduce recidivism.[86] Empathy is also fundamentally involved, along with arguments about fairness, when advocates for restorative justice urge attention to the needs of victims of crimes. As legal theorists and practitioners respond to the recent discussions of affect and compassion and the law, they should attend to the separate rich literature on empathy.

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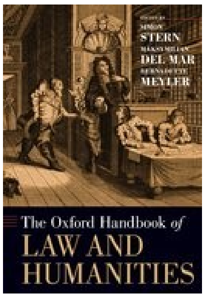

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CHAPTER

11 Mapping Law and Performance: Reflections on the Dilemmas of an Interdisciplinary Conjunction

Julie Stone Peters

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Abstract

In the past decade or so, there has been a substantial body of work in law and humanities in which "performance" serves as a key word, an umbrella term for a highly diverse set of inquiries: the examination of trials as theater, courtroom testimony, improvisatory judicial interpretation, embodied cognition, "acoustic jurisprudence," adversarial agonism, physiognomic credibility, video representation, symbolic "speech," police encounters, terrorism, the production of legal identities, and more. This chapter explores the meaning of "performance" in such studies, and recounts the author's attempts to map the terrain: to identify the separate kinds of inquiry that make up the study of law and performance; to offer a taxonomic overview of the whole. It describes the challenges the author encountered in attempting to do so, and what these reveal of the issues facing the study of law and performance. The last section reflects on some of the risks of interdisciplinary study generally, and the potential benefits that might accrue to law and performance if it resists becoming a "field" and remains, instead, a contingent conjunction.

Keywords: performance, performativity, theatricality, interdisciplinary, disciplinary

Subject: Jurisprudence and Philosophy of Law, Law and Society, Law

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IT is September 27, 2018. I click on the link for C-Span, and there is a man with furled brow, alternately weeping, sniffing, and shouting: "my family's been destroyed, … destroyed"; "thanks to [you], I may never teach again"; "thanks to [you], I may never … coach again," repeatedly interrupting while bellowing "let me finish," his voice quavering with tears and rising in rage. The Senate Judiciary Committee will soon vote on his fitness to sit on the Supreme Court of the United States. Brett Kavanaugh will almost certainly be our next Supreme Court Justice: we will know before I have finished writing this chapter. How he says what he says, his tone, facial expressions, body language, gestures, emotional affect could determine the outcome of the hearings, and thus the composition of the court. What the senators and the public see at these hearings, in this room, before this audience, in these few days may drastically alter the lives of untold numbers of people for generations to come (and far longer), determining who will grow richer and who will grow poorer, who will be protected and whose lives will be shattered. Performance here may, in effect, change the shape of American law.

In the past decade or so, the term "performance" has begun to show up in law and humanities work with increasing frequency. As a doctrinal term of art, the word had always, of course, had a significant place in law: for instance, in contract law or as a measure of institutional success or failure (in assessments of judiciary or police performance, for example). It began to appear in a broader sense in humanistic legal studies in the last decades of the twentieth century: in the late 1970s and 1980s as a way of describing legal speech (it was "performative" because it enacted things through language); and in the 1990s as a way of describing the formation and thus contingency of legal identities that had once seemed natural (gender, p. 200 race, or marriage, for instance, were "performative," ↳ produced through legal categories and enacted under the shadow of law). But only in the past decade or so has there been a substantial body of work in law and humanities in which "performance" serves as a more varied keyword, an umbrella term (often joined by "theatricality") for a highly diverse set of inquiries: the examination of trials as theater, courtroom testimony, improvisatory judicial interpretation, embodied cognition, "acoustic jurisprudence," adversarial agonism, physiognomic credibility, video representation, symbolic "speech," police encounters, terrorism, the production of legal identities, and much much more.[1]

11.1 What Is "Performance" in Performance Studies?

In these new iterations, the word derives much of its purchase and analytic power from concepts and methodologies developed in performance studies. However, despite the fact that performance studies is now nearly half a century old, the meaning of the field's keyword and its parameters remain somewhat murky. Those who founded performance studies in (roughly) the late 1970s initially had the view that, to justify the field's institutional autonomy, it was important to define its objects and distinguish them from those of seemingly similar fields, most notably theater studies, literature, and (to a lesser extent) anthropology: performance was not text (as in literary studies), and not mere aesthetic mimesis (as in theater studies), and not social structures or process (as in anthropology), but "showing doing" (as Richard Schechner famously described it).[2]

In "showing doing," performance was a kind of "restored" or "twice-behaved" behavior, Schechner explained: its demonstrative nature gave it a certain "as if" or subjunctive quality, reflecting self-conscious reproduction of a social or ritual script.[3] At the same time, performance was (paradoxically) not capable of reproduction because it was, by definition, live, not mechanically reproducible (as literature, film, or images were). As late as 1993, in a famous definition of "performance" for the purposes of performance studies, p. 201 Peggy Phelan declared: "Performance's only life is in the present. [It] cannot be ↳ saved, recorded, documented, or otherwise participate in the circulation of representations *of* representations: once it does so, it becomes something other than performance."[4] The focus on live (rather than mediated) objects dictated certain methodological constraints. Performance studies scholars were, like anthropologists, to do fieldwork, viewing the performances they wrote about in situ and real time: otherwise they would be merely studying the media that represented them. Thus, the field dealt largely with the present—performance that scholars had seen live—not with historical performance. "Performance" (as understood by the field) was therefore necessarily delimited: a thing that took place in local time and space.

Meanwhile, the term “performativity” began to enter the humanities: at first, in the late 1970s and 1980s, through Derrida’s critique of J. L. Austin’s account of linguistic “performatives”; then, in the 1990s, through Judith Butler’s account of the performativity of gender.[5] For Derrida, all forms of speech were “performatives”: enacting but also endlessly deferring their meaning. For Butler, “performativity” was not merely everyday role-playing (as it was, arguably, for Erving Goffman), but at the heart of identity (gender, sexual, and more): it was the thing that produced the “I” itself. Arguably, the concept of “performativity” in both senses built on the poststructuralist account of the constructedness of history and culture, translating its temporality: constructedness was largely something that had happened in the past; performativity was ongoing and continuous. With its bearing on both past and present, the concept of “performativity” became, in the 1990s, key to a broad critique of culture, most notably the critique of the production of identity but with wide-ranging applicability, facilitating its dissemination into various fields in the humanities.

Schechner had always understood “the performance of everyday life” as an instance of the twice-behaved behavior that was the object of the field. But it was only in the 1990s that “performativity” became central to performance studies. Since “performativity” was often covert, more being than showing (however ontologically contingent such being might be), the objects of performance studies no longer really had to “show” in any obvious way. All being was, in a sense, a form of showing. As ontological fact rather than merely event, “performance” and “performativity” were also clearly things that happened everywhere and all the time. Since “performance” could designate something as temporally and spatially specific as a suicide bombing or as diffuse as the ongoing performance of gender, one could study it as a phenomenon that happened across unbounded time and space. This required reconsidering performance studies’ implicit preference for studying live events. Phelan famously renounced her initial definition of performance fairly quickly, and others elaborated.[6] With the disappearance of liveness as a limit on what counted as p. 202 “performance,” there was really no bar to studying ↳ *representations* of performance: in video and audio, texts and images. Interpreting texts and images meant that historical events were also within the field’s purview.[7] Perhaps there was no need after all to strictly distinguish the field from media studies, film studies, music, art history, literature, history, or, in fact, theater studies.

Although Schechner had described the field as “between theatre and anthropology,”[8] performance studies had initially striven to distance itself from theater studies and distinguish its objects. Where theater was fake, performance was real. Where theater was preciously aesthetic and fundamentally bourgeois, performance was anti-aesthetic, transcending class. Where theater was mere entertainment, performance was *efficacious*: it made things happen. Interpreting theater merely propped up a dying institution; identifying performativity was a political act. However, some people noticed that it was often hard to distinguish “performance” from “theatricality,” which, after all, was also a means of “showing doing,” a fundamentally live set of embodied practices and events. In fact, while the term “theatricality” had had historically negative associations (artifice, affectation, ostentation, excess, melodrama, narcissistic attention-seeking, histrionics, hysteria),[9] it could also serve as an important critical term. Brechtian theatricality, for instance, could do much the same work as the Alienation Effect (or, in fact, “performativity”), serving to reveal the mechanisms of reality production so that one could set about changing them. Samuel Weber similarly used the term at once negatively, to describe the phenomenon of late modern capitalist mass media, with their mesmeric power to crush action and generate ceaseless desire, and positively, to critique that phenomenon.[10] In fact, the connection with theatricality was implicit in Butler’s very development of “performativity” as a concept. For Butler, theatricality could be a tool for the exposure of performativity, “a resignifying practice [that] contest[ed] the terms of [a norm’s] legitimacy,” allowing for “subversion,” a “*working [of] the weakness in the norm*.” The drag performer (for instance) could use theatricality to “*mim[e]* … discursive convention[s]” and *“rende[r] [them] hyperbolic*,” thereby “*revers[ing]*” them. Theatricality thus became a practice not of compulsory repetition (as in the performance of normative gender) but of *citation*, a kind of citation of norms that rendered them visible and thus “resignif[ied]” them.[11]

p. 203 As “theatricality” began to garner more critical attention (in part with the revival of its critical edge), performance studies began to merge (institutionally at least) with theater studies: in the 1990s, traditionalist theater scholars complained that performance studies was taking over the American Society for Theatre Research conference; by the beginning of the twenty-first century, such complaints had virtually disappeared, as “theater” departments became departments of “theater and performance studies.” Merging the two fields could be intellectually productive: theater studies had interpretative and historical tools valuable to the study of performance generally; examining the relationship between theater proper and social or cultural performance deepened the significance of theater as an institution. But the merger’s value was also institutional: universities were cutting humanities departments, but they were reluctant to cut theater (it provided, well, *theater*), so the merger helped to ensure the survival of performance studies as a field.

Performance studies was always, necessarily, an interdisciplinary enterprise. But its expansion to include “performativity,” “theatricality,” and a vast variety of objects in different media, framed in diverse kinds of space and time, situated in relationship to their interpreters in a variety of ways, some only marginally about showing and more about being, has brought with it an interdisciplinary capaciousness that the field’s originators may not have envisioned: studying performance, one is not limited by conditions of production or reception. One can, in fact, study virtually anything. That has, somewhat surprisingly, ended up being one of the keys to its success. If performance studies lost much of its distinctiveness, it turned out that legitimacy was not in fact to be found in distinctiveness (as performance scholars may have once thought), but in the portability of its key terms, its cross-disciplinary mobility, in a sense, the expansion of its empire.

11.2 Parsing Law and Performance: Tripartite Schemes, Venn Diagrams, and Other Sketchy Experiments

Meanwhile, law and literature was similarly expanding its domain, at once developing institutionally (with journals and conferences) and extending its purview to include a multitude of objects—texts that were neither literary nor legal in the narrow sense, video, images, cultural events—and employing a multitude of disciplinary methodologies. As the new century began, many law and literature scholars were feeling impatient with the limitations of the word “literature” (an impatience with the dominance of text-based criticism similar to that in cultural and performance studies in the late twentieth century), and were urging still wider interdisciplinarity: the field should give up the term “literature” (said some) and lead the way toward the broader field of “law, culture, and the humanities.” In an essay in *New Approaches to Law and Literature* (2017), Caleb Smith declared such an interdisciplinary future already upon us: “For better or for worse,” p. 204 ↳ writes Smith, “[o]ver the past decade or so, legal scholars interested in the critical humanities have not limited themselves to literature or literary theory, and literary critics interested in legal matters have found resources in fields (history, sociology, philosophy) beyond the law.”[12]

In his contribution to the same collection, Austin Sarat—perhaps the most prominent promoter of interdisciplinary (humanistic and social scientific) legal studies—argued, like Smith, that the “brightest future” for law and literature lay, in fact, in “pushing the boundaries of law and literary study … beyond the humanities,” and, indeed, beyond culture. He identified this new interdisciplinary entity—beyond humanities and culture—as “law as performance.” Law as performance, he explained, brings “literary and cultural analysis together with social studies of the way law performs in a variety of domains, from the appellate court to the cop on the beat, from stories about law in great literature to moments when law is silent.” The study of law as performance, he wrote, engages “scholarship on theatre, dance, music, ritual, carnival, and spectacle, and draw[s] on work in linguistics, anthropology, sociology, and theatre history." It avoids "privileging the word over the world or the world over the word," attending to "text, … context, role, and action, … staging, symbolization, [and] audience." It recognizes that legal practices are actions in the world and, at the same time, "meaning-making processes."[13]

A decade ago, a friend asked me to explain "the field of law and performance," and I responded: "it's not a field!" Reading Sarat's essay, I thought: actually, the *eminence* of interdisciplinary legal studies not only says "it's a field" but that it's the new and improved, bigger and better law and humanities, the most ultra-interdisciplinary of them all. I had been writing on this conjunction for the past decade or so: exploring historical legal events and practices through the lens of performance; attempting to demonstrate methods for the interpretation of legal staging, movement, gesture, affect, constructed space, temporal sequencing, and more; suggesting the importance of performance consciousness to legal history. And my own contribution to the volume was, in fact, about the distinction between law-and-literature and law-as-performance (with a particular focus on what it meant to study law not just "and" but "*as*" performance).[14] So Sarat's announcement was *excellent* news (thought I, in a moment of vainglory). I was invited soon after to write on performance for this collection, and, since it was a "handbook," it seemed to demand something more general than a description of my own particular project or the kind of narrowly focused historical p. 205 study that I had offered ↳ elsewhere.[15] It seemed to me that I should instead try, before anything else, to explain law and performance as a whole, describing the meaning of the conjunction for law and humanities generally.

For lack of a better place to start, I decided to begin with definitions: what were "law" and "performance," and what was the "and" that conjoined them? Skipping over "law" (on the grounds that it was unwise to tackle the question to which more-or-less two thousand years of jurisprudence had been dedicated, at least for the moment), I turned to the "and," the axis point between law and performance. To try to get to some kind of understanding of what it might mean, I began to scribble down some lists, starting by translating the "and" into three different prepositions, borrowed from law and literature's classification of its own project. It looked like this:

> **Law in Performance** (the *representation* of law, primarily in aesthetic performance): theater, dance, ritual, carnival, protest, etc.
>
> **Law of Performance** (the legal *regulation* of performance): regulation of theater, expressive action, obscenity, religious attire, performance copyright, identity, etc.
>
> **Law as Performance** (the *enactment* of law through performance): trials, policing, public punishment, etc.

This was not as clear as I had hoped. The prepositions refused to behave as they did in law and literature. "Law in literature" and "law as literature" seemed reasonably distinct from each other. But because of the predominantly non-aesthetic meaning that "performance" now has for academics in the humanities, "law in performance" seemed to evoke not aesthetic representations but events and practices in courtrooms and other legal spaces. So "law in performance" seemed hard to distinguish from "law as performance." To distinguish the two, I would have to explain that by "law in performance," I meant the study of aesthetic objects. My scheme would read "law in performance but what I really mean is aesthetic objects," "law of performance but what I really mean is legal texts," "law as performance which is different from law in performance although they sound the same." This was not really the succinct tripartite scheme I had in mind. Moreover, there was a third arena on which much law-and-performance work had focused: studies of the effect of law on the performance of everyday life (what Joshua Chambers-Letson identifies as "the quotidian").[16] If what I was really attempting to do was to distinguish performance in different socio-institutional spheres, my scheme should say so. I tried again.

> p. 206 **The Aesthetic** (representations of law through aesthetic performance): theater, dance, ritual, carnival, etc.
>
> **The Legal** (legal events, practices, and interpretation as performance): trials, policing, or the creation of judicial opinions or decisions, etc.
>
> **The Quotidian** (the performance of everyday life under law): the performance of identity, or other forms of quotidian or daily living "before the law."

This scheme had some defects: it did not clearly, for instance, identify the specifically legal in the first and third categories. But it was pithier. And it highlighted just how different aesthetic representations, legal events and practices, or just being "oneself" (for instance) could be from one another.

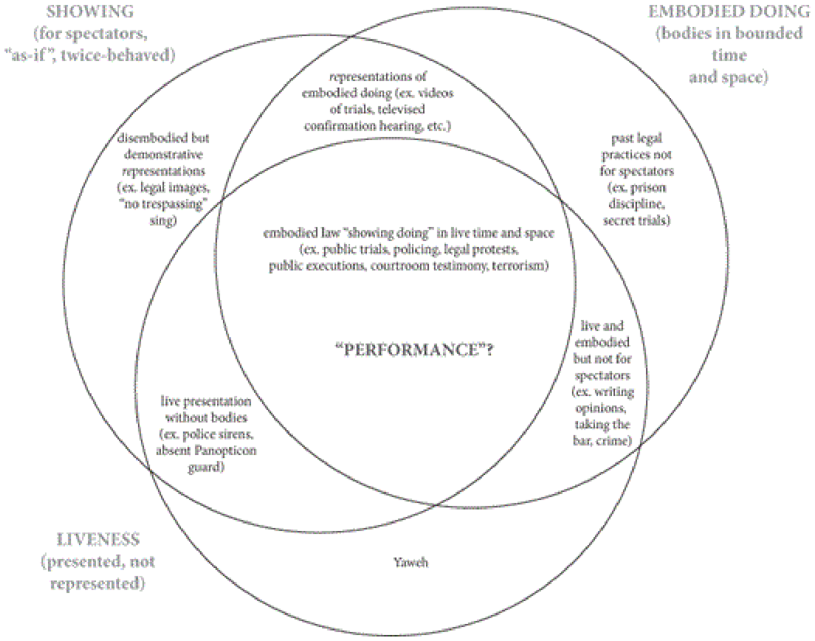
This highlighting of distinctions seemed a virtue of the scheme, but perhaps also a problem to be confronted. Many of the studies I had read argued (explicitly or implicitly) that these different kinds of performance were linked in various ways, or existed on a continuum: for instance, theatrical performances and legal decisions dealing with performance reflected similar social assumptions; or legal events shaped the performance of identity. But "performance" seemed to mean very different things in each of these domains. Was "performance"—in theatrical performances, in performatives in legal texts and decisions, in identity production, and elsewhere—a unified thing with a single identity? Before I could understand the "and," it seemed necessary to understand "performance." In an attempt to do this, I went back to Sarat's description of the emerging field of law as performance. The field, he said, would include: "scholarship on theatre, dance, music, ritual, carnival, and spectacle" (check!); "cop on the beat" (check!); "the appellate court" (check! at least for the hearings); "stories about law in great literature" (wait a minute, how is this different from law and literature?); "moments when law is silent" (what?)

I was later to discover what he meant by "moments when law is silent."[17] But then I thought: can everything that law ignores (for instance, heartbreak, just to take one devastating experience for which law offers us no compensation) really be understood as a "momen[t] when law is silent" and thus as a part of law? And even if we can cast law's silences as part of law (just as the white spaces in a negative are a necessary part of the image), what justifies treating such silences as *moments*? or treating an absence as an instance of performance? I went back to the folder I kept of articles on law and performance. Reading them, I found performing texts, performing doctrines, performing legal concepts, above all, performing identity. These performing texts, doctrines, concepts, and identities were rarely represented as embodied things localized p. 207 in any specific place and time: they were almost always diffuse abstractions, part of the conceptual ↳ atmosphere or *Zeitgeist*, ideologies, categories, rhetorical habits. Did everything perform all the time, even the invisible, the immaterial, the abstract? Even absence itself? And if so, was the study of law as *performance* in any way distinct from (for instance) the study of legal concepts or doctrines, which was (of course) the purview of the most traditional kind of legal study? Was "performance" in such studies really just another word for thinking about the world as process, or understanding being as always in a state of becoming (as twentieth-century phenomenology envisioned it)? Was it, then, simply a fancy word for (effectively) every kind of doing and being?

I thought back to the early days of performance studies, when the field had attempted to distinguish performance from other things by identifying its special features. I decided to try to determine whether "performance" was in fact a particular kind of thing. I would do this by looking at instances of "performance" in recent studies of law and performance to see whether they were marked by any of the special features that performance studies had initially identified as distinguishing performance from other kinds of things ("showing doing," embodiment, liveness, etc.) As I jotted down notes, I saw that each of the different instances of "performance" I encountered engaged in a different combination of those features.

Puzzling over how to represent these, I thought: I know, a Venn diagram! Surely that would be very systematic and thorough. The experiment looked like this (Figure 11.1):

Figure 11.1


SHOWING (for spectators, "as-if", twice-behaved)
EMBODIED DOING (bodies in bounded time and space)
representations of embodied doing (ex. videos of trials, televised confirmation hearing, etc.)
disembodied but demonstrative representations (ex. legal images, "no trespassing" sing)
past legal practices not for spectators (ex. prison discipline, secret trials)
embodied law "showing doing" in live time and space (ex. public trials, policing, legal protests, public executions, courtroom testimony, terrorism)
"PERFORMANCE"?
live and embodied but not for spectators (ex. writing opinions, taking the bar, crime)
live presentation without bodies (ex. police sirens, absent Panopticon guard)
LIVENESS (presented, not represented)
Yaweh

“Performance”?

p. 208 Fortunately, no one was demanding hard science here: the result was impressionistic (to say the least); the diagram restricted me to yet another tripartite scheme, one that seemed even more spurious than the others; I found myself moving the contents from one segment to another, and then another, in a futile attempt at philosophical exactitude in my distributional scheme. (The question mark was a belated addition expressive of diagrammatic despair.) The only thing that did seem clear was that many things that scholars identified as “performance” were in the peripheries or could not easily be placed anywhere in the diagram: judicial interpretation (whose analysis invariably focused on words and ideas rather than the judge in the courtroom); the production of the disciplinary self; certain legal concepts such as spatio-temporality, sovereignty, identity; “stories about law in great literature”; “moments when law is silent.”

As I looked more closely at the studies that my diagram represented, I began to notice that one could, in fact, often substitute certain words for “performance” or “performative” (“becoming,” “doing,” “creating,” “transformative,” “productive”)—or simply delete the words “performance” or “performative”—without much loss of meaning. The further I looked, the more I began to wonder whether the word “performance” offered any added value. Many studies used “performance” as an initial provocation but in fact offered no performance analysis. They contained extended analysis of texts, politics, law, historical injustice, all of which touched tangentially on a performance, or performance as a concept. But most, while interested in embodiment as an *idea*, seemed largely uninterested in actual embodiment (in bodies doing things in space and time); most, while interested in concepts of spectatorship, seemed largely uninterested in concretely realized moments of spectatorship. Overwhelmed by lengthy political and ethical discussions, performance often seemed to disappear.

My own recent experience gave me a glimpse into how this might happen. I had briefly toyed with the idea of writing about performance in the Kavanaugh Senate Confirmation hearings, made a few notes, and then given up. In the hearings, performance clearly mattered. But that was not news to anyone: not to humanities academics; not to the media; not, in fact, to Kavanaugh himself, who had declared (in a classic moment of legal antitheatricality), "this is a circus!" I had a lot to say about the significance of the hearings. But I—a scholar of performance and theater—had embarrassingly little to say specifically about performance (insofar as performance was distinct from everything else), or at least little to say that everyone didn't already know. I did still believe that studying performance was key to understanding law, in all its fullness. I theoretically had useful tools for doing so. But perhaps not all events and practices in which performance mattered to law were worthy of *performance* analysis per se, rather than analysis of politics, law, media, socioeconomics (etc.). Performance might be important to the event itself. But performance *analysis* might be of only marginal interest.

Did we need the concept of performance to study such events? People in theater and performance studies p. 209 departments were subject to an institutional demand that they ↳ write about performance. But, while they often included descriptions of aesthetic performances (theater, performance art, street spectacle), their essays seemed dominated by discussions of structures of culture and rhetoric, law, politics, or power, without demonstrating that performance was a thing whose specific characteristics might matter to law or a distinctive way of understanding legal texts, events, or practices. People in law schools were differently situated in relation to the field. Subject to an institutional demand that they write about doctrine, they wanted to write about performance: cutting-edge, radical, so much less boring than doctrine. But they seemed to quickly run out of things to say about any actual performances. Performance was interesting, but there was so much more to say about structures of culture and rhetoric, law, politics, or power, and, yes, even doctrine.

Different desires, emerging from different fields, seemed to produce the same result: essays in which "performance" served as a provocation, idea, or running theme but in which *performances* in legal domains were not the object of close or sustained analysis. At the same time, despite this shared tendency to slip away from performance interpretation into discussion of structures of culture (etc.), essays emerging from different fields also seemed in some ways radically different from one another. Curious about those differences, I decided to try an experiment: hire someone to compile some two dozen articles that seemed to deal with law and performance (from a humanities perspective) and anonymize them. I would then try to guess the author's principal discipline.

As it turned out, the task was almost too easy. Style was a giveaway. So were the essays' objects of analysis (theater, dance, or performance art versus technical constitutional interpretation, for instance). And so, notably, were the essays' endings. These revealed essential differences in norms for the narrative shape, arc, or telos of a piece of writing, and (perhaps more significantly) its payoff. They seemed to reflect unwritten rules: what one might call (following Derrida) the laws of disciplinary genre.[18] The shorthand (and grossly reductive) version of these laws is as follows. If you are a law professor, you must end with a clever claim significant to the interpretation of doctrine, suggesting a concrete change in judicial interpretation or legislation. If you are a professor of literature or performance, you must end by either celebrating popular or persecuted performance as an expression of political resistance or highlighting injustice (perhaps with an element of irony), but you must not propose narrow or concrete policy changes, for these would imply that policy tweaks might be sufficient to redressing injustice and would trivialize the moral gravity of what you have shown. If you are a professor of history, your interpretation must turn the reigning orthodoxy on its head, but you must never, *never* suggest that your historical analysis has the least use for the present. (I exaggerate for effect, but nevertheless.) In all three fields, any other conclusion would be disqualifying.

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11.3 Disciplinary Captivity/Interdisciplinary Pathologies

That semester, as I scanned yet another English Department dissertation with four chapters dutifully analyzing a literary text (at least two canonical), skimmed yet another law review article with a neat policy proposal tacked onto the end, reviewed yet another submission to a performance studies journal describing the scholar's subject position and bodily fluids (again, I exaggerate for effect, but nevertheless), I thought: interdisciplinarity triumphant? Who are we kidding? In her contribution to *New Directions in Law and Literature* (the 2017 collection that she and Elizabeth Anker edited and in which Smith's and Sarat's essays also appear), Bernadette Meyler writes that the "aspiration to put aside disciplinary boundaries [has] not … proved entirely feasible."[19] Looking at implicit institutional decrees (in John McKenzie's words, "Perform or Else!"),[20] "not … entirely" seems a vast understatement.

Meyler's main point, however, is not merely that we are trapped in disciplinarity but (surprisingly, from a co-editor of *New Directions in Law and Literature* and the *Oxford Handbook of Law and Humanities*) that this may in fact be a good thing. Disciplines, Meyler argues, are "engines" of knowledge, but also productive "impediments." Looking across at another field may spur desire ("I want what she's having!"), but disciplinary boundaries block the possibility of complete merger, of one field dissolving into another. We are, it seems, mating in disciplinary captivity, a captivity that makes us look at not just one other field but often at several, longing to turn a *folie à deux* into a *ménage à trois* (in an irrepressible polyandry). Perverse as this may be, it is, in Meyler's account, in fact productive for thought and knowledge: triangular desire (or, theoretically, quadrangular or pentangular, though one has only so much stamina …) makes disciplines dynamic. The "attraction of fields for each other waxes and wanes": one day I may long for history, but another day for law, and still another day for law's romance with history. The spurring of desire, its blocking, its transference or displacement (and more) creates a "dynamism," argues Meyler, that "advances the possibilities for new births of knowledge."[21] It could be argued that disciplinary *boundaries* are not essential to the dynamic play of disciplines. But the frustrated desire of *amours impossibles* certainly helps.

Foucault transformed "discipline" into a dirty word: a prime target of postmodern contempt. More than one generation of humanities scholars (mine among them) has been trained to think that discipline and disciplinarity are bad. We are so accustomed to believing in the virtues of "transgressing" disciplinary borders ("transgression" is always good, "boundaries" always bad) that we have forgotten to question whether such p. 211 ↳ transgression is always, in all circumstances, a virtue, and whether it does not sometimes also produce certain deformations. I remain committed to the view that the study of law as performance is important to understanding law generally, and that interdisciplinary work generally is valuable. But recognizing the value of interdisciplinarity does not preclude also recognizing its potential problems. What follows are musings on some of these: problems, or pathologies, to which interdisciplines are especially susceptible, some of which are illustrated by my ruminations on law and performance in the previous section. None is perhaps unique to interdisciplinarity. And each problem I describe might be seen, from another perspective, as in fact a strength. But they are dangers for interdisciplinary study: bad things that can happen to good marriages (no aspersions on the institution of marriage necessarily intended).

First, *sham interdisciplinarity*. My "guess-their-discipline" experiment revealed the fact that, while we may declare our liberty in work that crosses disciplines, disciplines bind us in myriad ways. (The job market and tenure are two of the most palpable.) However newly created, once instituted, disciplines become machines whose norms tend to march on, even, sometimes, when no one in the room thinks they should. (Anyone who has been to a faculty meeting knows what I mean.) It is a sociological truism to point out that institutions reproduce themselves by rewarding conformity, but it is one of those truisms that happens to be true: academic rewards and plaudits rarely come from defying the norms of one's discipline. (What appears brilliant defiance may in fact simply be a counter-norm: tenured professors are allowed to write radical treatises, or even popular books of certain kinds: yes to popular history or detective fiction; no to romance fiction, self-improvement, advertising copy, or porn, except of course radical feminist porn, which is okay.) So, we must ask ourselves: what are the limits of interdisciplinarity? Is what we call interdisciplinarity really just an illusion (as I once suggested law and literature's interdisciplinarity was)? Are we deluding ourselves?

Second, sham interdisciplinarity's corollary: *interpretive mimicry*. Those who defend distinctive disciplines often argue that only disciplines can properly teach rigor by training their graduate students in the field's established methodologies. It is tempting to mock the methodology police, agents of "discipline" and "training": they are not the mavericks but the disciples (so to speak), those who cannot see past narrow-minded disciplinary conventions. I have done so myself. The benefits of disciplinary methodology, however, can become suddenly visible when one comes upon a scholar from another field attempting the pirouettes and arabesques of one's own, but in ways that seem flat-footed imitation. Interdisciplinarity often produces precisely such mimic interpretative moves. One tries on another field's interpretative devices, one deploys its critics and its buzzwords in a kind of bravado, "I can do that too." But one can't always, or not without more practice. And the buzzwords, often already old and exhausted in the donor field, are reduced still further in the recipient field. In a disciplinary dyad, each field recycles the other's tired ideas, … in caricature. Looking hard and long at one's own disciplinary objects, repeatedly trying out and assessing the discipline's methodologies for interpreting them, one comes to be able to perceive many otherwise invisible p. 212 truths in a small thing, so that a single object can yield a multitude of surprises, of hidden depths (depths ↳ that are, surface reading tells us, to be found even in surfaces if one knows how to look). If we are to learn to see in a particular way, or understand how a particular thing works, we must take our time. Interdisciplinarity does not always allow us to do so.

Third, *object blur*. One of the payoffs of twentieth- and twenty-first-century interdisciplinarity has been a critical perspective on a field's key term that challenges conventional conceptions and broadens its meaning. For instance, religion: the early twentieth-century theologian Paul Tillich argued that one could use the word "religion" in a narrow sense, denoting institutionalized religions such as Christianity, Islam, and Judaism, or a broad sense, denoting whatever had ultimate value.[22] If the struggle for human rights was, for instance, one's ultimate value, one might consider it "religion." Thus, philosophers, political theorists, those who studied aesthetics—not just theologians—could be experts on "religion." This was a project of critique: only the narrow-minded would understand religion in the narrow sense. But it was also a project of recuperation: it redeemed "religion" from the taint of particularism and sectarian prejudice by generalizing it. Religion, generalized, was to be abstracted from its history of murderous violence.

We tend to think that, by broadening our key disciplinary terms, we can free ourselves from their limitations in the name of cultural critique. When Butler (via Althusser and Lacan) explains that we are all "hailed" by law (interpellated by the law of ideology, the Law of the Father, the laws of normativity), this expansive sense of "law" becomes a tool for the exposure of its insidious reach. "Law" in this broad sense names all the powers that bind us.[23] But perhaps in this broad account of "law," something is lost: recognition of the specific power of the institution (different in rather significant respects from the "law" that determines our entry into the Lacanian Symbolic), and recognition of the specific ways we might intervene in that specific power, even if we are helpless before the Symbolic. Similarly, "performance": when the term comes to denote all behavior, practices, processes, constructs, rhetorical expressions, all social formations, all meaning, all being, we may lose the power to say something about what performance in the narrow sense (overt and embodied "showing doing," a unique practice different from other kinds of behavior) achieves.

Fourth, *values flattening*. Disciplines bear with them a set of values (implicit or explicit) about what scholarship and teaching are for. Behind these lie a set of views about the ultimate good. For Meyler, the virtue of disciplinary difference is that (however triangulated, frustrated, resisted) it produces change. But perhaps sometimes our old differences, affirmed, are in fact goods in themselves. Norms about what counts as the appropriate ending for a scholarly article may be irritatingly narrow-minded. But if we were somehow to escape them into a kind of freeform interdisciplinarity, we would lose the ability to ask one p. 213 another why you do it this way and I do it that way, to set one ↳ norm against another, to remind ourselves (through those differences) why we are engaged in the academic enterprise in the first place. I say “I,” not “you.” Because it may just be that I think mine is better than yours.

Finally, *rapid obsolescence*. In his essay promoting the multidisciplinary study of law and performance, Sarat describes the shift from “charisma” to “routinization” that can overtake once-exciting areas of study. He speculates that such a shift has taken place in law and literature (quoting Richard Abel on a similar shift in law and society): at first, the field had a magical power to inspire devotion, but after a few decades, it had begun to “ru[n] so smoothly along familiar tracks that the questions and answers ha[d] begun to sound a comfortable, but rather boring ‘clackety-clack.’ ”[24] All fields have periods of routinization. All fields have moments in which world-shattering critical insights turn out to have mutated, horribly and irreversibly, into cliché. But interdisciplinary formations are perhaps particularly prone to such routinization because, while they seem more capacious than single disciplines (two fields in one!), their focus on a particular axis—the crossing point of two disciplines—often actually limits their scope. Some interdisciplinary enterprises do retain their freshness, perhaps because they conjoin multiple methodologies acting on a wide and important field of objects in which scholars with very different perspectives have an interest. But others form around a limited set of ideas (often linked to those buzzwords or phrases so easily transferred through interpretative mimicry), ideas that start to become mechanical, soon grow irritatingly predictable, and then turn into the butt of academic satire. When that happens, the interdiscipline begins to lose its purchase, eventually melting away and leaving institutional husks behind it: centers that no one visits; majors that have no courses. Not all (field) marriages are meant to last.

11.4 Conclusion

I hope that the study of law and performance lasts, at the very least as a set of ongoing and richly varied, mutually informing explorations. It does not need to be a “field” to do so. In fact, perhaps a strategic disciplinarity—the embrace of disciplinary difference for analysis and values clarification, a pause in the conjunction’s drive toward formal interdisciplinarity—may strengthen rather than weaken the work that emerges from it. Perhaps, as a corollary, it would be liberating to acknowledge that different kinds of performance in different domains (the aesthetic, the legal, and the quotidian) are, in fact, really *different*, and do not need to be yoked together into a single narrative showing the coherence of the field. Perhaps such a disaggregation—resisting the ossification of claims about the mutual constitution of aesthetic, legal, and quotidian performance—could prevent the study of law and performance from devolving into the p. 214 routinization and eventual obsolescence that befalls so many disciplinary conjunctions. I hope that, ↳ in fact, my tripartite schemes will soon be outdated, not because the conjunction law-and-performance has disappeared, but because it will continue to surprise me in its revelations, innovations, transmutations, and resistance to routinization. I hope that I don’t yet know its future shape.

But, a final thought (in case I have not contradicted myself sufficiently). As I face with growing alarm the likelihood that *Obergefell v. Hodges* will be overturned, ending (or radically limiting) gay marriage, I think that perhaps what became most routinized—most endlessly recapitulated—in law and performance over the past quarter century has been its most important contribution so far: the repeated assertion that legal identities and concepts are produced performatively, that the self is produced through a performative iteration that the law affirms, guarantees, indeed often demands. Perhaps it was the repetition of this assertion—echoed in classroom after classroom, infusing itself from scholarship into the mainstream press until one felt one really *had* had enough of “performativity”—that played a central role in making *Obergefell v. Hodges* possible. Perhaps the entrenched view that only marriage between people of the opposite sex was natural and the absolutist gender distinction that guaranteed that idea were defeated by trickle-down performativity. In the humanities, we tend to presume that innovation is our primary value: we teach our students (even our undergraduates) to “say something new,” to “make an original contribution to scholarship,” to avoid critical commonplaces. And yet, it is arguably repetition of a truth—the reiteration of ideas until they have become commonplace (even flagrant clichés)—that brings social and political change. The current political atmosphere reminds us how quickly such truths can disappear, and how much we may need such repetition.

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Notes

1 For some examples, see "Further Reading" and Subha Mukherji's chapter, "Facing Justice: Evidence, Legibility, and Pensiveness in the Early Modern Imagination"; Marett Leiboff's chapter, "Challenging the Legal Self Through Performance"; Panu Minkkinen's chapter, "Agonism, Democracy, and Law"; Ellen Spolsky's chapter, "The Gap Between Fairness and Law: *Hamlet* and Equity from a Cognitive Perspective"; Timothy Hyde's chapter, "Boundaries, Walls,

Envelopes, Rooms, and Other Spatialities of Law"; Mariana Valverde's chapter, "Spacetime in/and Law"; and Bennett Capers's chapter, "Video as Text/Archive"; all in this volume.

2 " 'Showing doing' is performing: pointing to, underlining, and displaying doing." "The underlying notion is that any action that is framed, enacted, presented, highlighted, or displayed is a performance." Richard Schechner, *Performance Studies: An Introduction*, 3rd ed. (New York: Routledge, 2013), 28, 2.

3 Schechner, "Restoration of Behavior," *Between Theater and Anthropology* (Philadelphia: University of Pennsylvania Press, 1985), 35, 37, 52.

4 Peggy Phelan, *Unmarked: The Politics of Performance* (New York: Routledge, 1993), 146.

5 The classic texts are: J. L. Austin, *How to Do Things with Words* (Cambridge: Harvard University Press, 1962); Jacques Derrida, "Signature Event Context," *Glyph* 1 (1977): 172–197; and Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990).

6 See, for instance, Philip Auslander, "The Performativity of Performance Documentation," *PAJ: A Journal of Performance and Art [PAJ 84]* 28 (2006): 1–10.

7 See, for instance, Joseph Roach, *Cities of the Dead: Circum-Atlantic Performance* (New York: Columbia University Press, 1996). There have subsequently been important theoretical reflections on the field's historicity, most notably Diana Taylor, *The Archive and the Repertoire: Performing Cultural Memory in the Americas* (Durham, NC: Duke University Press, 2003); and Rebecca Schneider, *Performing Remains: Art and War in Times of Theatrical Reenactment* (New York: Routledge, 2011).

8 Schechner, *Between Theater & Anthropology* (Philadelphia: University of Pennsylvania Press, 1985).

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10 Samuel Weber, *Theatricality as Medium* (New York: Fordham University Press, 2004).

11 Judith Butler, *Bodies That Matter: On the Discursive Limits of Sex* (New York: Routledge, 2011), 177, 181.

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13 Austin Sarat, "From Charisma to Routinization and Beyond: Speculations on the Future of the Study of Law and Literature," in *New Directions in Law and Literature*, ed. Anker and Meyler, 59–67, 64–65.

14 Julie Stone Peters, "Law as Performance: Historical Interpretation, Objects, Lexicons, and Other Methodological Problems," in *New Directions in Law and Literature*, ed. Anker and Meyler, 193–209.

15 See, for instance, Julie Stone Peters, "Staging the Last Judgment in the Trial of Charles I," *Representations* 143 (Summer 2018): 1–35; "Penitentiary Performances: Spectators, Affecting Scenes, and Terrible Apparitions in the Nineteenth-Century Model Prison," in *Law and Performance*, ed. Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey (Amherst: University of Massachusetts Press, 2018), 18–67; "Theatrocracy Unwired: Legal Performance in the Modern Mediasphere," *Law & Literature* 26 (2014): 31–64; and "Theatricality, Legalism, and the Scenography of Suffering in the Trial of Warren Hastings and Richard Brinsley Sheridan's *Pizarro*," *Law & Literature* 18 (2006): 15–45.

16 Joshua Chambers-Letson, *A Race So Different: Performance and Law in Asian America* (New York: New York University Press, 2013), 6.

17 Sarat is clearly referring to an essay in his coedited collection: Lara D. Nielsen's "Freedom with Silence: Cryptoanalytics and the *Differend* in the Afterlives of Legal Things," in *Law and Performance*, ed. Austin Sarat et al. (Amherst: University of Massachusetts Press, 2018), 156–206, in which Nielsen discusses disappearances in Mexico, and the artists and publics who use "silence" as a resource for bringing into focus "the durability of the law's administrative and bureaucratic operations as things that are hidden in plain sight, even as they are rerouted" (ibid., 160).

18 See Jacques Derrida, "The Law of Genre," trans. Avital Ronell, *Critical Inquiry* 7 (1980): 55–81.

19 Bernadette Meyler, "Law, Literature, and History: The Love Triangle," in *New Directions in Law and Literature*, ed. Anker and Meyler, 160–175, 160.

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22 Paul Tillich, *My Search for Absolutes* (New York: Simon and Schuster, 1967). See Nathaniel Berman, " 'In a Place Parallel to God: The Draft, the Demonic, and the Conscientious Cubist," *Journal of Law and Religion*, 32:2 (2017), 311–339.

23 See, for instance, her discussion in Judith Butler, *The Psychic Life of Power: Theories in Subjection* (Stanford, CA: Stanford University Press, 1997), 83–105.

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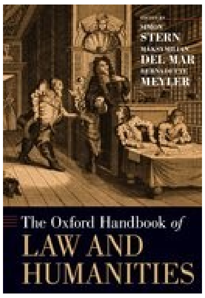

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CHAPTER

12 Spacetime in/and Law

Mariana Valverde

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Abstract

Philosophers have explored the varying temporalities that different legal systems and techniques utilize or construct. Recently, a lively literature on law, space, and regulation has also flourished, mainly among geographers and urban studies scholars. While legal temporalities and legal spaces or spatializations are often discussed separately, in large part due to disciplinary barriers, this chapter shows that it is more appropriate to think about the "spacetime" of law and legal processes rather than engage only with either temporality or space.

Keywords: Spatialization, temporalization, space, time, chronotope, governance

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FOR some decades now, some legal and sociolegal scholars, usually anthropologists or philosophers, have explored the varying temporalities that different legal systems and techniques utilize or construct. More recently, a lively literature on law, space and regulation has flourished, initially amongst scholars located at the intersection of law and geography but currently including many whose research agendas are mainly focused not on any discipline but on such issues as colonialism and racism. While legal temporalities and legal spaces or spatializations are often discussed separately, this contribution hopes to show that it is more appropriate to think about the "spacetime" of law and legal processes, rather than engage only with temporality or with space.

The materiality of law, an important issue being explored by many legal anthropologists and other sociolegal scholars,[1] will be occasionally brought into the argument. But trying to cover or explain the vast literature on materiality would give the false impression that analyses of the materiality of law make up a distinct body of work, when in fact materiality is now often included in a wide range of studies using many different sources and methods. In my view, drawing attention to law's materiality necessarily implies acknowledging the spatio-temporal specificity of legal entities—not only buildings such as courthouses but also entities whose materiality often goes unnoticed in legal scholarship, such as fill-in-the-blanks forms,

even the lowly parenthesis.[2] While many of the studies exploring the spatio-temporal dynamics of legal
tools and processes explicitly consider materiality, others do not. Hence, it is feasible to focus this chapter
p. 220 on questions of spatio-temporality, even though one can anticipate that in the future ↳ the two questions
(spacetime and materiality) will likely become better integrated in interdisciplinary legal studies (as is
intimated in Tomlins's contribution). As Kant noted centuries ago, space and time are the key "filters"
through which humans perceive the world, and so spatio-temporality can be said to be the *sine qua non*
feature of the material world as humans know it, that is, the sensible world.

This chapter proceeds in four sections. Section 12.1 provides an overview of some of the most important literatures concerned with law's temporalities. I say "some" of the literatures because the aim here is not comprehensiveness: in particular, philosophical explorations of law and time that use the work of authors such as Henri Bergson and Gilles Deleuze are somewhat neglected in the present account. Given that existing work does not facilitate a truly integrated analysis or even a single "review of the literature," I admit a preference for concrete analyses of how legal processes rely on and also construct particular spacetimes, in contrast to more philosophical discussions. In my view, philosophical work on space, time, and governance, legal or otherwise, can be very inspiring, but I hope to show that legal and sociolegal scholars would do well to question the traditional prestige of philosophy in the academy and pay close attention to concrete studies of interesting or unpredictable legal spatio-temporalities. Such concrete studies do not necessarily displace or replace philosophical work on temporality; but if we are to get past generalizations about law in general, and appreciate temporality as a key dimension of everyday legal proceedings alongside spatialization, concrete studies are more likely to be directly helpful.

The admittedly partial overview of research on law and temporality presented here is followed by a brief account of the rise and current state of legal geography (see Section 12.2) or more accurately, the broader literature on law, space, and regulation, which draws attention to the implications of choosing to govern people and problems through space and spatial regulation rather than through other categories (such as criminal law's "persons" and their acts).

Synthesizing temporal and spatial analyses, the project that suggests itself once surveys of "law and time" and "law and space" studies are completed is a meta-analytical task, one that can or could be undertaken from many different perspectives. Section 12.3 will explain one such effort to provide an integrated approach that does not divide time from space. In recent work, I have argued that borrowing Mikhail Bakhtin's[3] notion of "chronotopes" can be very useful for sociolegal purposes, precisely to get past the unnecessary division between the literature on law and temporality and the literature on law and space. In Section 12.3 I briefly summarize this argument about the "chronotope" and show what it might do for "law and humanities" work. Finally, Section 12.4 draws attention to some spatio-temporal aspects of law that have yet to receive sustained analytical attention, in my own work as well as in other work cited here, thus suggesting some potential avenues for new research.

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12.1 The Temporalities of Law: Anthropological, Historiographical and Legal Studies Perspectives

One of the most influential works on legal temporalities is Carol Greenhouse's 1996 book.[4] This work examines how particular temporalizations shaped and were shaped by large-scale legal systems. Greenhouse documents the constitution of Western linear time, first in Christian narratives of creation, sin, and redemption and then in scientific and bureaucratic assumptions about development and progress. The close connection between linear time and the European nation state is of particular interest to Greenhouse: "[S]ince the Middle Ages, linear time has been the time of the nation-state, although its modes of rationalization (as technology and social control) vary with time and place."[5]

Other anthropologists and legal scholars have documented what one could call the other side of this dynamic, by demonstrating (for example) how difficult it is for narratives of occupation and possession that do not employ the linear time of conventional history to gain any legal status for purposes of Indigenous land claims and other Indigenous rights (such as fishing and hunting). In Canada, judges in Indigenous cases have been presented with impossible questions about the admissibility and weight of evidence in non-conventional formats, questions that cannot be solved without arbitrariness since the opposing parties have incommensurable temporal sensibilities. It is well nigh impossible for a judge to non-arbitrarily decide what weight to assign, in a trial, to evidence of occupation and possession that uses ontologies that refuse to separate the spiritual and the material, as well as periodizations that break with linear time, such as regarding the time of creation, the time of the ancestors, and the recent past as three qualitatively different "times."[6]

Mid-twentieth-century anthropological studies tended to contrast "Western" to "Indigenous" legal temporalizations in a somewhat binary manner, following the epistemological tracks laid down by early studies of legal pluralism in colonial contexts. By contrast, more recent work has drawn attention to the fact that dualistic legal pluralism tends to objectify and falsely unify both sides of the colonial/Indigenous divide. Thus, recent work often emphasizes that within a single cultural/legal system, incompatible temporalities can and are deployed, sometimes by the same person. A notable study of this intra-cultural time shifting, using legal sources of data, is Justin Richland's influential ↳ empirical study of proceedings in Hopi tribal courts.[7] One and the same Hopi witness can easily shift from a "sovereign time"—the temporality of tribal/national sovereignty—to a more everyday and fluid temporality that does not project or presuppose a single unified authority. In disputes about property, Richland's careful analysis of the wording used by witnesses shows that Hopi speakers will toggle back and forth between "sovereign time" and the more pragmatic temporality of kinship and everyday land use. There is therefore no such thing as "Indigenous" legal temporality.

Along similar lines, my own research on the neo-medieval temporality of "the honor of the Crown"—a surprisingly recent invention in Canadian jurisprudence on Indigenous rights—has drawn attention to the incommensurability between the scientifically inflected evolutionary time of "normal" Western law, on the one hand,[8] and the timeless temporality of a Crown that judges have decided is by definition inherently and immortally honorable, and retroactively so. How this works is as follows (roughly): if the historically documented actions of government actors are shown to have been less than honorable, the gap between the virtue that exists by definition in the mystical realm of the Crown and the often sordid reality of state administration must be attributed (judges have decided) to deficiencies in various agents of the Crown—deficiencies that can be retroactively erased by enlightened judges who conclude that "the honor of the Crown demands" that a certain action or a certain treaty be re-read in such a way as to provide some kind of remedy (usually limited to telling governments to negotiate), but without casting any bad light on the immortal Crown.[9] What is brilliant about ascribing inherent and timeless honor to "the Crown" is that the same maneuver by which Indigenous groups get some courtroom victories against governments also re-installs and indeed revives, in an oddly contemporary form, medieval doctrines about the Crown as the mystical body of the monarchy, doctrines whose temporalization differs markedly from that of "normal" European law.[10]

These two studies (Richland's and mine) can serve here as examples of sociolegal research that focuses on the multiplication of legal temporalities even within the same "system," work that departs significantly from the large-scale contrasts between Western and non-Western legal temporalities drawn by Carol Greenhouse and other anthropologists.

The main argument shared by these studies of the epistemological and ontological contradictions found within a single "legal system" has close parallels in recent work on temporality by theoretically inclined legal historians.

p. 223 In an intellectual history of American common-law thought that has relevance throughout the common-law world despite its own insistence on US particularities, Kunal Parker seeks to push critical sociolegal scholars out of the by now comfortable domain created by the appeal to historicization and historical "context" that shaped critical legal studies in the 1960s and 1970s.[11] Parker does this by documenting the existence and continued success, within the common law, of a range of different temporalities—not only those of "time immemorial" and "custom,"[12] but a wide range of other temporalities, including some that are present- or future-oriented.

Again challenging the conventions of the critical legal studies that flourished from the 1970s onward, Parker refuses to immediately assign a political valence to each of the temporalities generated by and used in common-law reasoning. Time immemorial is not always a conservative trope, Parker shows, and neither is social contract constitutionalism essentially progressive. Parker shows that while Burkean legal conservatives certainly deployed the temporal tropes of unwilled, gradual, organic legal evolution, legal actors keen on seeing democratic legislatures pass novel laws also deployed tropes of organic community and unwilled evolution for their purposes. The general will of the community, that imagined or posited entity that undergirds common law's own justification of itself, turns out to have been, in nineteenth century American common-law thought, a multiscalar and multitemporal moving target. Parker shows, with much evidence, that common-law judges easily mixed the past-oriented and evolutionist temporality generally associated with the common law with the Thomas Paine idea of a rationally chosen, explicitly articulated consent designed to function as the end of "the past" and the dawn of a new future.

Notably, Parker's conclusions about the easy coexistence of temporalities—and logics—that appear to be incompatible was reached not through philosophical or historiographic reasoning but by studying writings by judges and legal authorities. Parker's work is thus legal scholarship in the classic sense, but it fits well with the findings of those current-day legal anthropologists who refuse to work with simple binary oppositions between Western/modern law on the one hand and traditional or premodern or Indigenous law on the other.

But it is not only anthropologists and historians who are challenging the old idea about legal systems having a single or at least a dominant temporality. One legal scholar doing particularly innovative work documenting—and theorizing—the plural temporalities that are found throughout the (British, in her case) legal system is Emily Grabham, who is neither an anthropologist nor a historian. Her recent book is influenced by legal anthropologists documenting the legal effects and causes of material forms and objects, but Grabham focuses on temporality more than on materiality, arguing, somewhat against Carol
p. 224 Greenhouse, that in the workings of law we see not only the ↳ power of large-scale culturally embedded temporalities (such as those of Western linear time) but also many smaller-scale, more mundane and heterogeneous temporalities created by law itself, temporalities whose lack of coordination does not pose a problem for law itself precisely because they are embedded in particular legal techniques, techniques housed in legal complexes that are thought of as autonomous.[13]

British employment law, Grabham shows, throws up, in an unpredictable manner, a wide array of specifically legal temporalities. One example studied at some length is the future-oriented, prognosis-driven, medically generated temporality of disease "progression": as Grabham shows, this biomedical category of time produces disability as a legal matter.

In another field, human rights, Grabham notes that a highly peculiar temporality (which as far as I know is unique to the UK) was created at the time when transgender activists gained the right to change gender on official identification. A decision was made, apparently in the House of Lords, to allow individuals to change their gender, but with the gender change being strictly limited to one time in one's life. Being granted the privilege to choose a new gender requires a two-year qualification or wait period (a one-year or two-year qualification period being a common legal requirement in other countries), but, unusually, the new gender has to remain fixed "until death," the statute states.

Most likely, the "until death" clause was the product of transphobic fears about people whimsically changing their gender willy-nilly, anxieties echoing older misogynistic fears about women taking advantage of the legalization of abortion to abort mindlessly and frequently. But Grabham eschews the obvious political assumptions that become visible in the legislative debates: she focuses instead on the peculiar effects, on time itself, of the letter of the law. The "until death" requirement paradoxically immobilizes gender (or rather the gender of transgender people) for life—in the same statute that allows, for the first time, legal gender change.

Further studies might compare this "until death" clause with the internally contradictory temporality of marriage created by the fact that while wedding vows still say "until death do us part," divorce law provides ample opportunities for people to escape from their supposedly lifelong marital obligations (and without limiting divorces to one in one's life!). No doubt other areas of law would provide equally rich comparative possibilities. Further studies of some of the contradictory temporalities imposed by mundane legal doctrines and mechanisms on human experience would do a great deal to move sociolegal studies of temporality beyond the large-scale contrasts between systems analyzed by the older legal pluralism literature.

Grabham's work does not focus on space. Her analyses are not spatially insensitive, not surprisingly since the literature on the materiality of law on which she heavily draws does, to varying extents, consider not only how law governs people and problems through space but also how law is itself spatialized. However, p. 225 Grabham's theoretical introduction discusses at length anthropological and philosophical writers who offer ↳ resources for critically thinking about temporalization and law, but does not cover legal geography or other work on space and regulation from subfields such as Black geography or Indigenous geography.[14] This temporally oriented one-sidedness is the mirror image of the one-sidedness that will be discussed in the next section, that is, the temporal "deafness," so to speak, of the literature on law, space, and regulation.

12.2 Legal Studies and the Literature on Governing Space and Governing through Space

Sociolegal scholars are affected by shifts in theoretical fashions that cross the social sciences and humanities. The "turn to space" that from the 1980s and 1990s onward generated countless studies of how legal and quasi-legal mechanisms govern people and problems by arranging and rearranging spaces owed a great deal to a general shift in social theory.

Unfortunately, the "space race" in social theory (associated with Edward Soja, Frederic Jameson, and David Harvey) began by dismissing existing critical theory as impoverished because it was supposedly fixated on historical evolution—identified with an interest in time as such. Early advocates of postmodern thinking counterposed spatial analysis, presented as inherently sophisticated and postmodern, not only to history but to time itself (in a manner that would have appalled not only Martin Heidegger but also Immanuel Kant).

The late British feminist geographer Doreen Massey was one of the few voices raised from within, among progressive geographers, to critique this highly self-serving binarism. A brief selection of Massey's string of quotes about abstract space, taken from key male theorists, gives a sense both of the argument and of Massey's skepticism: " 'Space is very much on the agenda these days … **It is space, not time, that hides consequences from us** …' (Berger) '[T]hat new spatiality implicit in the postmodern' (Jameson); 'it is **space rather than time** which is the distinctively significant dimension of contemporary capitalism' (Urry)."[15]

Sociolegal researchers generally eschew such metaphysical generalities. However, being exhorted by influential theorists to notice space and ignore temporal dynamics, scholars looking at such emerging legal techniques as anti-homeless bylaws and p. 226 ↳ exclusionary park regulations were encouraged to focus exclusively on the fact that poor people were being spatially managed rather than personally targeted (as had been the case with vagrancy laws).That parks and other urban spaces, from public squares to pubs, are governed through countless regulations that are temporally specific (daytime vs. night time, weekends vs. weekdays, opening time and closing time, etc.) as well as space-specific tended to go unnoticed in much of the "law and space" literature that flourished in the 1990s and beyond.

Admittedly, temporality plays less of an overt role in some areas of law, such as constitutional and criminal law, than it does in urban governance, a subfield within which studies of spatial governance particularly flourished. In general, not only do certain areas of law have affinities with particular temporalities,[16] but, more profoundly, temporalization matters more in and for some areas of law than in others.

Nevertheless, it is clear in retrospect that the theoretically prestigious call to focus on space and spatial dynamics, while stimulating much interesting and lastingly influential work, also had a limiting effect on sociolegal scholarship. It is sad but true that space as such, separated off from timespace, was for some time seen as inherently theoretically fruitful.[17] In particular, postmodern thinking established its own brand of cultural capital by embracing space, as such, and dismissing temporality as somehow hard-wired to old fashioned modernist historicism.

The space race in social theory, as it seeped into legal studies (a process that, incidentally, seems to have been felt far less in the British sociolegal academy than in North America and Australia) had the effect of marginalizing legal history, at a time when legal history had gained some prestige in critical circles due to the crits' emphasis on historical context. But the tendency to favorably contrast analyses of the spatial dynamics of postmodern capitalism to nineteenth-century historicist accounts had the effect of disrespecting not only conventional legal history of the sort carried out in most North American law schools but also the novel work on non-Western legalities and temporalities published from the 1990s onward by such thinkers as Arjun Appadurai and Dipesh Chakrabarty.[18] Along with many other postcolonial thinkers, Appadurai and Chakrabarty showed that historians' and social scientists' intellectual landscape is impoverished—as well as "Eurocentrized"—by assuming that time as such can be equated with Western European historicism or historicity.

One influential sociolegal author coming to prominence in the context of the space race in theory was David Delaney, one of the co-editors of the first legal geography anthology and author of a book with the high-theory title of *The Spatial, the Legal and the Pragmatics of World-making: Nomospheric Investigations*.[19] The p. 227 neologism ↳ "nomosphere" was meant to draw attention to the ways in which law and other types of regulation (nomos) work through and on space (sphere)—with Delaney then inventing arguably reifying abstractions, such as "nomicity." Delaney's work was adopted as a "theoretical model" by a significant number of legal and sociolegal scholars, in the USA at any rate, adding to the success of the "law and space" literature.[20]

While Delaney followed the "postmodern" notion that up-to-date theory requires privileging spatial dynamics, much of his substantive research interest lay in the racism embedded in US law and governance: and since no racism can be understood or explained without history, his analyses were less unidimensionally spatial than those of more famous theorists. Unfortunately, however, the temporalities of law, in Delaney's work, are reduced to "historical context," in classic critical legal studies manner.[21] Delaney's analyses of particular governance measures are generally historically rooted; but his *theory* privileges space alone.

While in North America studies of "law and space" proliferated, in the UK, curiously, some of the Marxist geographers who had most enthusiastically taken up the banner of space came to adopt a more measured and less unidimensional approach to research on governance. It is worth explaining this shift toward a more integrated approach briefly, because thus far few sociolegal scholars in the UK or anywhere else have used this particular subliterature within British geography.

Drawing on earlier Swedish work on "time geography," Jon May and Nigel Thrift made an influential call for integrating temporal and spatial dimensions in analyses of power and experience.[22] The anthology they edited to demonstrate the fruitfulness of this integrated approach tries to bring more or less anthropological work on temporality into the fold of geography, which to a non-geographer is bound to look like a rather unnecessary disciplinary maneuver; but be that as it may, the anthology contains some fascinating studies of the spatio-temporal dynamics of governance (though none, unfortunately, specifically focused on law). Jenny Shaw, for instance, documents how a problem perceived as spatial (the city is not a place to bring up kids) leads British executives to move their families to small towns that are so far from employment centers that huge temporal problems are created for family life itself (impossible parental commutes, nonexistent weekday family evenings).[23] Shaw's study of the unintended ironies of hegemonic ideas about the proper space of children contains some reflections that could be useful for sociolegal studies. In particular, Shaw's study could lead to more general reflections on how the temporal divisions of the so-called lifecourse have come to be spatialized in specific places/cultures—with retirement, for example, having come to be ↳ associated with and almost hard-wired to certain types of housing and certain types of towns/villages, among middle-class Westerners. Downtown condominiums marketed to "empty nesters," which have mushroomed in cities such as Toronto, would be a good example of the unconscious linking of temporal, spatial, and real estate forms suggested by Shaw.

Another contributor to the May and Thrift volume studied the gendered spatio-temporal dynamics of a village near Cambridge. There, most of the men spend the workday in global exchanges with scientists and scholars around the world, while their mainly female partners, back in the village, lead lives whose temporal as well as spatial horizons are much more limited.[24] This is important because generalizations about emerging temporalities that are relevant to legal studies often fail to note that Internet communications and global financial transactions still require, for the daily and generational reproduction of the people who communicate and transact, the spatio-temporally restricted work of housewives, cleaners, child minders, and food preparers.[25]

Legal scholars interested in the everyday life of law could well use these and similar studies of the spatio-temporalities of everyday life as starting points to examine how particular legal techniques and doctrines produce—or presuppose—particular spatio-temporalities, which may be quite at odds with other legal spatio-temporalities that exist at other scales even in the same space.

12.3 An Integrative Approach to the Study of Legal Spatio-Temporalities: Law's Chronotopes

Law and humanities work is by nature interdisciplinary, but there is no such thing as interdisciplinarity in general. It has been shown that legal geographers often neglect temporality altogether, due to their discipline's privileging of space; similarly, anthropologists trained to notice cultural variations in temporal experience and in periodization often ignore relevant findings from the "law and space" literature. Historians, on their part, might believe that because they study the past they understand temporality as such, without reflecting on the Eurocentric narrowness of their own temporal reasoning.[26]

One resource that is available for legal scholars who are leery of all disciplinary biases, including those of geography, anthropology, and history, is found in the work on literary genres of Russian literary critic and p. 229 philosopher Mikhail Bakhtin. His influential ↳ theory about literary genres as "chronotopes," that is, particular relationships between temporality and spatialization, is extremely useful for legal analysis and need not privilege literary preferences, as I have shown at length elsewhere.[27]

Interestingly, Bakhtin's idea of genres as chronotopes was itself the result of interdisciplinary borrowing. Apparently, Bakhtin had some acquaintance with early twentieth-century physics, specifically relativity theory, which broke with the Newtonian habit of regarding time and space as separate and objectively real dimensions of the world.[28] In keeping with Einstein's discoveries, Bakhtin was not merely interested in adding a spatial analysis of genres to a temporal analysis. The chronotope is not a two-variable model but rather a device to highlight how spatial dynamics shape temporal dynamics and vice versa, just like in relativity theory.

The notion of chronotope is arguably dialectical, since it draws attention to how the temporal and spatial dimensions of literary representations affect one another. The chronotope, Bakhtin states, is "the intrinsic connectedness of spatial relationships that are artistically expressed in literature. … Time, as it were, thickens, takes on flesh, becomes artistically visible; likewise, space becomes charged and responsive to the movements of time, plot, and history."[29]

Bakhtin then goes on to show that genres that routinely use Fate (rather than willed human choices) to move the plot along not only deploy a suprahuman temporality but also generate spatializations that are not scientific and objective. If a story depends on a witch or a spirit to continue, this affects not only the temporality of the story but also its spatialization, which becomes rather indeterminate. For example (my example, not Bakhtin's), the witches in Macbeth are not really in Scotland, or at least, not in the way that the contemporary fictional detective John Rebus is in Scotland.

Given that Bakhtin's main interest is describing the unique spatio-temporality of the modern novel, most of the long essay on chronotopes illuminates the modern novel's chronotope by means of contrasts. Thus, the Greek romance, on which Bakhtin spends much time, is shown to both rely on and produce a rather abstract spacetime: heroes are said to travel from Egypt to Greece or other countries, but no cultural or demographic barriers appear to be crossed. The absence of modern notions of travel as leading to personal growth is reflected in the absence of what novel readers would consider as the normal temporality of aging: if the Greek heroes meet after years of separation, as is often the case, they will not be described as a day older than when they first met. A rather indeterminate but static spatio-temporality, therefore, dominates the venue as well as the characters: the place to which heroes return after their travails remains absolutely static (even if new characters, like Penelope's suitors, have appeared on the static scene).

The spatio-temporality of the modern novel thus emerges, as the essay progresses, not only as different from spatio-temporalities of older genres but as constituting the very "essence" of the novel as such. To say that causality works in distinctive ways in the modern novel or that subjectivity takes a distinct form, as p. 230 current literary scholars ↳ might put it, is to say that the modern novel is characterized by distinctive spatio-temporal logics, Bakhtin suggests.

Insofar as law is, among other thing, always a system of communication and of representation, it is possible to transpose into a legal key Bakhtin's argument about the key role of spatio-temporal dynamics. An important note is that there could be many ways of adapting Bakhtin's chronotope analysis for legal scholarship. Some might prefer to treat each established area of law as a single chronotope, examining how the overall spatio-temporal dynamic of the criminal law, say, is different from that of family law, or international law. For some purposes, especially in the context of law school teaching, that might be fruitful.

However, proceeding in this manner, a move that blackboxes the internal workings of each “area” of law, would prevent us from appreciating that within a single field of law there can be a wide variety of techniques, doctrines, and forms of reasoning with quite different spatio-temporalities and epistemologies. In criminal law, just to give one example, the logic of responsibilizing a person for an act (preferably a consciously willed act), and then imposing a punishment on a supposedly rational person on a retributive basis is certainly prominent—but there are also other criminal-law logics, such as the forward-looking spatio-temporality of rehabilitation, relationship restoration, and reintegration.

Similarly, my own research on the history of planning law, specifically on the genealogy of the key notion of “land use,” has shown that while one can construct a plausible unidirectional evolutionist story in which the highly specific, subjective, and backward-looking spatio-temporality of nuisance gives way to the ambitious and objectifying preventive spatio-temporality of land use planning, in fact, contemporary urban law continues to require frequently reactivations of the premodern logic of site-specific, intersubjective, qualitative “offensiveness” that is the core of nuisance. The eternal return of premodern subjective and site-specific nuisance in urban governance troubles Foucault-style accounts of modernist power/knowledge, though my own research has not yet shown whether this is a particular feature of the urban scale or whether urban examples point to a larger dialectical dynamic within “modern” law.

Whatever the generalizability of the findings, I have shown that as a matter of legal fact urban disturbances such as noises can only be regulated by means of numerical rules about time of day and decibels up to a point. Nuisance lawsuits are rare, but the logic of nuisance cannot be wholly eliminated.[30] Cities continue to send inspectors to suppress noises that are deemed offensive or out of place/time, decibel levels notwithstanding. And noxious smells, which resist quantification even more than noise, continue to provide material for disputes that cannot be resolved by the top-down application of objective rules.[31]

p. 231 In general, rules of general application are frequently drawn up and inserted into municipal codes with reformist legalistic enthusiasm, but in the end, it has proven impossible to completely sideline the necessarily subjective differences between the “normal” city annoyances that urban citizens must live with (as the Quebec civil code puts it) and what amounts to intolerable interference with “the quiet enjoyment of one’s property” (as English nuisance law puts it).[32]

How does this relate to chronotope analysis? It relates in that the eternal return of premodern interpersonal, subjective nuisance logics (even if it is limited to the urban realm, which is doubtful) shows that two legal chronotopes, two spatio-temporal legal logics, can coexist in the same space. The noisy downtown urban neighborhood is a spacetime that can and is simultaneously governed through two legal chronotopes. The first one is composed of objective and often numerical rules of general application designed to map and control the whole space (identified roughly with the modernist city planning project). The second legal chronotope is that of “nuisance,” an embodied, site-specific, and inevitably subjective way of governing disputes and disturbances. Legal cases as well as my own empirical research on urban governance show that unpleasant noises and bothersome neighbors continue to be governed through nuisance logics and nuisance-type rules (such as British antisocial behavior orders) alongside top-down, jurisdiction-wide objective rules.

A legal chronotope is thus not a particular spacetime but rather a set of techniques that have an affinity for one another and that require and produce particular spatio-temporal logics as they represent and govern various spacetimes. In arguing this I am following Bakhtin. Bakhtin would say that one and the same actual “spacetime,” say an English village, can easily be represented and to that extent managed through different literary chronotopes: an Agatha Christie-style murder mystery; a sci-fi novel; a lyric poem; a Jane Austen novel of family wealth and kinship; and so on.

If Bakhtin's chronotopes are generated in the sphere of representation, not that of sociology or social history, so too legal chronotopes take form in the sphere of governance (which of course is also a sphere of representation). To refer back to one of Emily Grabham's examples: it is disability law that produces the peculiarly imprecise chronotope embedded in the legal requirement that a claimant prove that he or she is "more likely than not" to be prevented from working normally.[33] The non-actuarial futurity of "more likely than not" is not produced within medicine even though medical evidence is used to produce it: it is produced by law itself—just as legal insanity is produced by law, not medicine, even though medical experts are deployed to generate facts for law. Thus, law constantly throws up a variety of spatio-temporal logics to represent and act on issues and problems—and that is what I mean by "chronotopes of law."[34]

p. 232 A final point regarding chronotope analysis is that it is not possible to "see" how a particular chronotope establishes a strong connection between one form of temporalization and a form of spatialization except by contrast. The modern novel's distinctiveness can only be apprehended by contrasts with earlier modes of representing experience. And in Bakhtin's work the contrasts are multiple, not binary—an important point given that a great deal of sociolegal work influenced by Foucault tends to deploy binary oppositions (sovereignty vs. discipline, etc.). Bakhtin does not contrast "the classical" with "the modern" sensibility but instead analyzes the spatio-temporal logics of a whole range of genres. His emphasis on multiplicity and heterogeneity in modes of representation could be inspiring for legal scholars interested in going beyond traditional binary thinking (liberal vs. authoritarian, objective vs. subjective, etc.) in order to document the proliferation and the coexistence of contingently generated legal chronotopes whose political and social implications cannot be assumed.

To conclude this section it may be useful to give a concrete example of one legal chronotope not discussed in my earlier work, namely, a chronotope created as a solution to a property problem (how to ensure continuity of collective, mainly ecclesiastical, property). The corporate charter—or more specifically, the "perpetual succession" powers that are an integral part of this legal form, whether or not this is explicitly recognized in legal documents—underlines the point implicitly made earlier to the effect that identifying legal chronotopes is not like identifying biological species. While a spatio-temporal invention ("the power of perpetual succession" encourages certain legal moves and discourages others, the specific effects of one and the same legal technique vary a great deal depending on the larger legal assemblage within which it occurs. Perpetual succession in contemporary corporations listed on stock exchanges is not exactly the same as the perpetual succession of medieval abbeys, or that of a quasi-state body such as the seventeenth-century Hudson's Bay Company.

As Bakhtin would have predicted, the immortal temporality of "perpetual succession" had major effects on spatial arrangements. The earlier use of perpetual succession created such legal spaces as monastery lands (and Oxford college lands); transposed into the scale of transoceanic commerce, the legal technique drew invisible borders around far vaster and often unmapped and hence indefinite land masses. The early seventeenth-century Hudson's Bay company charter thus gives the "lords and proprietors" of the company both jurisdiction and property rights over an indeterminate area described as all land draining into Hudson's Bay, a part of the globe that had not yet been mapped.

Chartered corporations were not just vehicles for property holding and property transfer; as seen in the epic seventeenth- and eighteenth-century fight between the Corporation of the City of London and the Crown, jurisdiction went hand in hand with property, contrary to contemporary ideas about political power being monopolized by the state.[35]

p. 233 Traditional legal thinking would counterpose the law of corporations to the constitutional law of the state, and would regard Philip Stern's research on the East India Company's wielding of jurisdiction alongside property rights as an exception. However, as Frederick Maitland showed long ago, the state and the corporation are not as different, as legal forms, as one might think.[36] The Crown, after all, is from one point of view "a corporation sole."

In keeping with Maitland's point, but in a very different political context, an American political scientist has recently argued that contrary to the Lockean myth of the United States being formed once and for all through a social contract, the key legal underpinning of the US Constitution, he argues, is a kind of corporate charter. The corporate legal form was transposed into public law, with "the people of the United States" replacing the monarch in claiming the power to authorize the formation of a new collective entity. David Ciepley even argues that judicial review too is grounded in corporate mechanisms. If Ciepley is correct, even republican government, not just Maitland's Crown, owes a great deal to the fundamental legal invention of the corporation endowed with the power of perpetual succession.[37]

Be that as it may, the point here is that the "perpetual succession" clause found today in statutes constituting public agencies as well as in those establishing for-profit corporations is a temporal invention with important spatial effects. The perpetual succession clause creates a space of governance, and also draws lines around real property and/or sovereign territory, in a way that is more expansive and more secure than that available to the individual human person.

12.4 Conclusion

For those who have no loyalty to geography's space or anthropologists' time but seek instead an integrated analytical framework, using an adaptation of Bakhtin's notion of "chronotope" is only one option among many. Many of the sources mentioned above, while often emphasizing time rather than space or vice versa, could be stretched to encompass the dynamic and interactive relationship between temporalization and spatialization that Bakhtin analyzes in his own way.

At present there are legal anthropologists, theoreticians of legal history, legal geographers, and legal scholars who are experimenting with different ways of appreciating the materiality and "sensibility," so to speak, found in and to some extent constitutive of different legal processes, venues, techniques, and doctrines. In pursuing analyses of spatio-temporality different scholars will draw on their own prior expertise. Contract lawyers, just to give one example, could perhaps ponder the spatio-temporal logic contained in the fundamental legal fiction of the instantaneity of the contract—closely connected to the doctrine of party autonomy, with its built-in spatio-temporal assumptions about human conduct.[38]

On their part, critical studies of criminal law could probe the assumptions that undergird law's insistence that conduct harmful to others needs to be seen as located, for legal purposes, in a single, identifiable, point—like spacetime. Courtroom lawyers argue about where exactly the crime of tax evasion through tax havens was committed, for instance, but in doing so, they take it for granted that criminal behavior must be assigned a single spacetime. Legal arguments about whether the crime should be affixed to the place where it was plotted or the place where its effects were mainly felt all assume a certain spatio-temporality, one that in a sense defines crime itself.

Future studies could thus use any number of different analytical tools and methodological traditions to cast new light on many fairly conventional doctrines and techniques of law, in order to deepen our understanding of the worldly rootedness, the spatio-temporally specific materiality of legal processes.

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Notes

1 See, e.g., Timothy Hyde’s chapter, “Boundaries, Walls, Envelopes, Rooms, and Other Spatialities of Law,” and Christopher Tomlins’s chapter, “Materialism and Legal Historiography, From Bachelard to Benjamin,” both in this volume.

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14 Indigenous sociolegal scholars rarely publish in geography journals or take the time to critique the discipline, so the

phrase “Indigenous geography” is problematic, but black geography certainly exists as a literature within geography. An important author here is McKrittick at Queen’s University in Canada; see, for example, Katherine McKrittick, “On Plantations, Prisons, and a Black Sense of Place,” *Social and Cultural Geography* 8 (2011): 947–963.

15 Doreen Massey, *Space, Place, and Gender* (Cambridge: Polity Press, 1994) (emphasis added); see also Doreen Massey, *Space, Place, and Gender* (London: SAGE, 2005).

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25 Saskia Sassen emphasizes this dual spatiotemporal character of current international finance at a much more macro level. See Saskia Sassen, *Global City: New York, London, Tokyo* (Princeton, NJ: Princeton University Press, 2001).

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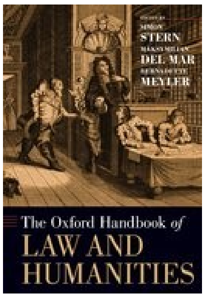

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CHAPTER

13 Boundaries, Walls, Envelopes, Rooms, and Other Spatialities of Law

Timothy Hyde

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Abstract

This chapter outlines the several scales at which material arrangements of architecture, urbanism, and territory are bound up with surrounding legal contexts. Using these three scales, the chapter elucidates the reciprocity of law and space, a reciprocity through which the law is spatialized by its distributions across places and locales and space is differentiated and particularized by law. A courtroom, for example, is a physical space and a locus for legal process; a city street is a material conjunction of objects and persons as well as a concretization of codes and regulations; a territorial boundary is a demarcated section of land and an inscription of legal permissions and constraints. These different mediums of social inhabitation, of such different scales, are imperfectly coordinated, yet with their often inextricable connections they comprise a domain of great relevance to law and humanities. Within this domain, which consists of disciplinary intersections of law with architectural history and theory, with geography, and with urban studies, the complex interactions of norms with the contingencies of myriad cultural productions come into view. Regulatory instruments, plans, buildings, pillars, rooms, regions, and other arrangements can be seen to function as techniques for the projection and translation of juridical and spatial orderings.

Keywords: architecture, space, territory, geography, materiality, performance, form, style, zoning, code

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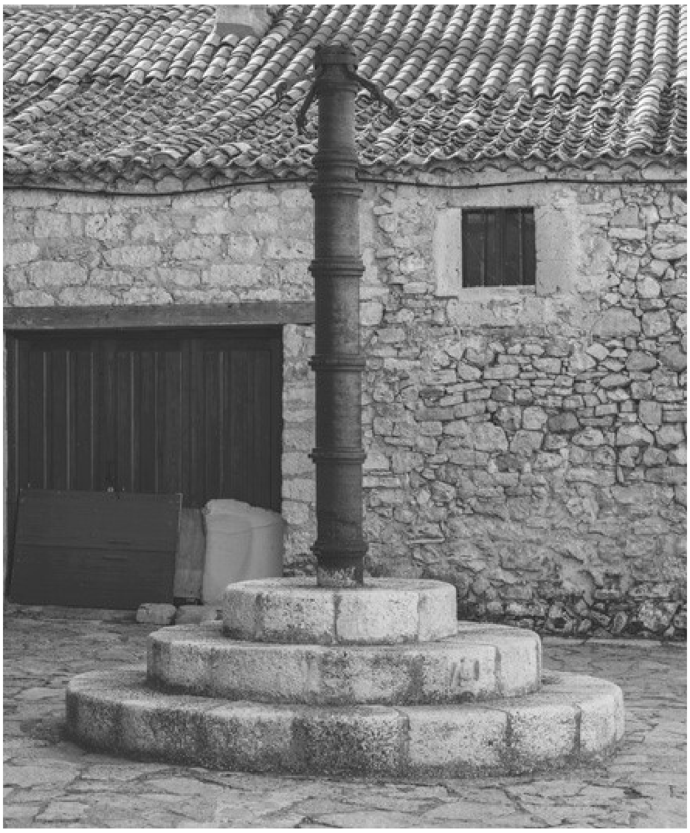
IN the ritual foundation of the city of Rome, a plow carved a line to circumscribe the boundary of the future city. The disturbed soil pushed to one side of the furrow created a circular ridge broken only by three deliberate gaps (made by lifting the plow) to mark the three gates that would open the interior of the city to the surrounding territory. The furrow and the ridge were symbolic renderings of the devices that would mediate the city and territory, the furrow a moat, and the ridge the city walls. The ritual also demarked another line, without physical presence but of constitutive importance, just inside the perimeter of mounded earth. This line established the religious boundary, the limit within which the religious action of augury could be undertaken. From the simple gesture of marking a line upon the ground resulted the constitution of both a physical space and a legal space, and the inseparability of the two.

The two spaces were neither isomorphic nor permanent. The city wall (*moenia*) and the religious boundary (*pomerium*) could be, and several times were, expanded or extended to encompass new grounds and define new limits for the city, and each possessed a distinct medium of existence.[1] The *moenia*, which provided control, the possibility of military defense, and a symbol of presence and authority, resulted from the mobilization of labor and materials, while the *pomerium*, a designation of permissible practices, behaviors, and authority, was an instrument of regulation produced ceremonially by verbal or textual designation. Their relationship was reciprocal. The word *pomerium*—a contraction of "inside the walls"—conveys p. 236 succinctly the spatial constitution ↳ of the law, and the *moeria* was in turn conditioned by its legal companion. The city wall has two sides, after all, one to address the interior it protects and the other the territory it excludes. This two-sidedness of the wall is its legal aspect, for it is the legal differentiation of city and territory that gives meaning to the wall, and it is the spatiality of law—its self-definition of jurisdiction—that produces city *and* territory. As the relation of *moeria* and *pomerium* suggests, law and space are mutually constituting; law has a spatial aspect and space has a legal aspect. From the plowed furrow that founded the city of Rome and from the juxtaposition it initiated of tangible object and immaterial rule unfolds a complex fabric of dependencies and reciprocities between the practices of spatial organization—urbanism, architecture, inhabitation—and those of law.

13.1 The Projections of Law and Territory

Though the line inscribed upon the ground establishes the differentiation of city and territory, the use of a tool—the plow—to create that line should not be overlooked as a dimension of the productive reciprocity of law and space. The plow, in its use, is a cultural technique, a technology *and* a production of cultural definition, and it is only one of a number of cultural techniques that substantiate the correspondences of law and space. The *rollo*, a pillar erected at the center of many early modern Spanish towns, was a jurisdictional marker that both established and symbolized the legal authority controlling the physical space and its inhabitants[2] (Figure 13.1). The town was simultaneously contained within a space of law and made to function as the means for projecting that space of law outward from a central point. Where the city wall marked a legal boundary mimetically, the physical object of the *rollo* enacted a mode of spatial projection by which the state claimed its territory.

Figure 13.1



Rollo de justicia, Rello, Soria, Spain

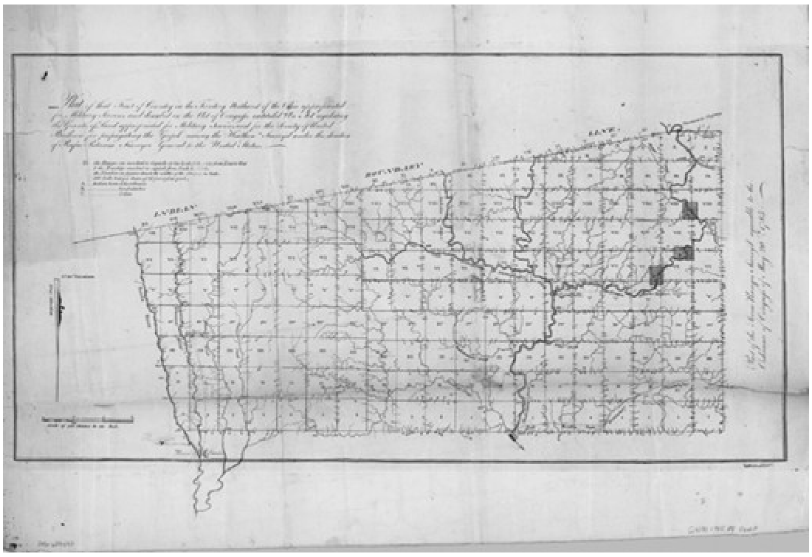
Diego Delso, delso.photo, License CC-BY-SA

To regulate the colonization of the New World in the sixteenth century, Spanish kings employed this projection of a territorial scale of legal spatiality with ever greater ambition, with myriad ordinances later known as *Las Leyes de Indias* (The Laws of the Indies) comprising a comprehensive plan for the settlement and subordination of vast areas of inhabited lands.[3] *Las Leyes de Indias* granted license of discovery, gave instruction for encounters with aboriginal inhabitants, and specified how new towns were to be founded p. 237 and land to be distributed as property. Some of the articles supplied broad ↳ directives, advising, for example, that new towns should be located in sites with beneficial orientation to the sun and prevailing winds; others issued narrow requirements, such as the exact dimensions of the permissible types of urban lots. Supplementing regulations of urban form were requirements dealing with legal structures, including legislative and fiscal matters.[4] *Las Leyes de Indias* produced a synthesis of law and spatiality, influencing the typical physical form of Latin American towns and cities, with a grid of blocks centered upon a rectilinear *plaza de armas* framed by the civic institutions of the church and the state, and also the administrative forms of these settlements.

p. 238 Two centuries later, the vast continental territory to the north of the Spanish settlements was also subjected to an expansive codification through spatio-legal instruments. Charters were the first devices employed that assigned legal existence to the territories of North America settled by European colonizers. Such charters, indifferent to the presence of aboriginal peoples, assumed the land upon which they were superimposed to be undifferentiated, uncultivated, and unsettled. Following the union of the former British colonies as a federation of states, a new instrument projected the appropriation and settlement of the enormous unexplored territories to the west of the newly established United States. The passage of the Land Ordinance of 1785 by the Congress debating the Articles of Confederation signaled the acceptance of a common future of westward expansion and the assertion of a need to regulate that expansion with an agreed legal framework of survey and the designation of boundaries, limits, and extents upon the varied topographies of the continent.

The Land Ordinance of 1785, as a written document only several pages in length, gave spatial definition to millions of square miles of territory through a formulation of geographical survey and administrative regulation of the sale of land.[5] Under the terms of the Land Ordinance, after existing Native American claims were purchased, the western territories would be surveyed—by surveyors representing each state—and platted into regular "townships," each one square with its six-mile-long sides aligned upon the ordinal lines running north-south and east-west. Each township would be subdivided into thirty-six "sections," which could be further apportioned into smaller lots, such as the later well-publicized forty-acre plot (Figure 13.2). In addition to ordering this survey, the Land Ordinance of 1785 also regulated the distribution and sale of land, specifying that townships would be sold alternately entire and in sections. Within each township, four sections were reserved for the federal government and a fifth was to be held for the purposes of public education.[6]

Figure 13.2



Plat of land in northwest Ohio, drawn c. 1798, "part of the seven ranges survey'd agreeable to the ordinance of Congress of May 20th, 1785."

Library of Congress, Geography and Map Division.

Sales of land in the first surveyed ranges were not as brisk as the drafters of the Ordinance had anticipated, but its structure of survey and property distribution nevertheless served as the model for the continental settlement that proceeded over the course of the following century. By 1900, the territory of the contiguous United States west of the original colonies had been organized into the now familiar checkerboard arrangement of townships and sections, perceptible on the ground in the grid of roadways and crossroads and visible from the air in the patterning of adjacent rectilinear plots of cultivated land. This rational arrangement of space, almost too familiar to be recognized by its inhabitants, is a legal arrangement, one that is most evident in its moments of contrast, as in the juxtapositions of sharp delineations of property p. 239 and the ↳ irregularities of natural topography. Such moments of contrast reveal the artifice of the grid, the device that conjoins spatial organization and legal regulation. The predictable and infinite extensibility of the grid along with its inherent scalar methods of subdivision are not only spatial properties but legal ones as well, guaranteeing as they do the universal application of a norm across territory and the capacity to manage myriad specificities within that norm.

In the later period of the era of exploration and colonization, projective spatio-legal instruments such as the Laws of the Indies or the Land Ordinance of 1785 were not sufficient to guarantee the legal spatiality of a newly identified category of territory, *terra nullius*, or "nobody's land." That legal designation emerged in the late nineteenth century, in the context of resolving and justifying colonial territorial claims within the contours of international law, and in the context of the exploration of the inhospitable territories of the polar regions. In the latter, nations anticipated the need to establish rights and sovereignty in areas where permanent settlement was impossible and geographic contiguities did not exist.[7] As the first expeditions p. 240 arrived on the shores of the continent of ↳ Antarctica, it was no longer the case that the symbolic act of planting a national flag would amount to a claim of possession.

The debate on *terra nullius* established the principle of a territory occupied by no one, and therefore possessed by no nation, that might therefore be claimed. But the claim must be established through occupation and use of the territory, rather than by symbolic gesture. In the arctic region, the designation of territory was complicated by the absence of *terra firma*—there was only ocean under the ice after all—but the principle of *terra nullius* was still relevant to disputes over islands such as Svalbard.[8] In the southern polar region, an enormous body of land was discovered and its edges mapped, but *terra nullius*, along with the peculiar convergence of longitude at the point of the pole, prompted many overlapping claims, none of them universally or even widely recognized. The doctrine led instead to a different legal form, the Antarctic Treaty signed in 1959, which established the space of Antarctica to be a territory outside the structure of nations, an independent and ungoverned legal entity constituted by the terms of the treaty and its protocols.

In other territories, the doctrine of *terra nullius* was put to very different purposes. Colonial enterprises undertaken in lands occupied by aboriginal people, which therefore faced the legal predicament of a prior claim to possession, were justified under a specific interpretation of *terra nullius*. In this interpretation, *terra nullius* referred to lands that were not civilized, that is, not subjected to settlement and cultivation in the model of European occupation of territories through cities and organized agriculture. In application, *terra nullius* would refer to any land that did not already mirror the structure of inhabitation of the European power that invoked it. Australia was a prominent case, with the legal principle invoked in exactly these terms in order to deny the prior possession of the aboriginal people who had occupied the land of the continent for thousands of years but in a very different manner of settlement that British authorities and court proceedings distinguished from their norm of civilization. In the last decades of the twentieth century the invocation of *terra nullius* as the basis of the Australian nation state was challenged in courts, and in a partial refutation, title to lands was granted to aboriginal claimants on the grounds of a prior possession.[9]

Each of these instances of territorial designation, from the Spanish conquest, to the American westward expansion, to the retrospective legitimations of *terra nullius*, produced and depended upon spatio-legal designations.[10] These designations were supported by conceptual instruments that produced and embodied p. 241 the conflation or ↳ reciprocity of space and law. The originary moment of the founding of Rome, and by extension the founding of Roman law, was constituted by the boundary, the definition of the two sides of inclusion and exclusion differentiating legal environments. In the territorial definition of Spanish law, the punctum embodied by the *rollo jurisdiccional* produced the encompassing legal environment, a space of legal jurisdiction and enforcement. The Land Ordinance of 1785 employed the grid as its instrument to give definition to territories of unknown scope and character. The doctrine of *terra nullius*, perhaps most abstract in its spatial marking, depended upon the concept of the void, a space without physical markers that could nevertheless be brought into legal presence. Though each of these spatio-legal instruments and its accompanying instruments was embedded within discrete historical contingencies, when seen as cultural techniques within a shared category of territorialization, they can maintain simultaneously their specificity as physical manifestations and their novel standing as conceptual propositions.

13.2 Space, Law, and the Right to the City

The inseparability of colonial projects from their legal spatiality was demonstrated by a different means in London in 1772, by the recognition of an instrumental asymmetry of space and law. In the case of *Somerset v. Stewart*, Lord Mansfield was called upon to decide whether James Somerset, a slave purchased in the Massachusetts Bay Colony and brought by his master to London and there escaped, could be forcibly kept in his state of slavery and transported against his will to Jamaica.[11] Mansfield ruled that slavery could be sustained only by positive law and that no law in England allowed slavery and therefore in England, Somerset was no slave. The distance between England and the Massachusetts colony was not only a physical one but a legal one also. The distinction of laws that existed between distinct nations or distinct kingdoms or empires might be familiar enough, but *Somerset v. Stewart* illuminated distinctions that might exist within Britain's seemingly cohesive imperial territory. These were not inherited distinctions such as the dissimilarities of English and Scottish law but novel ones newly recognized. Within the shared space of the Atlantic, the racial predeterminations of one geography were not the same as another and could not produce the same consequences. But if this distinction offered emancipation for James Somerset, it more generally produced uneven representation, installing vast inequities of segregation as the persistent spatial legacies of differentiated legal constructions.

Such legacies came to be the explicit object of the interpretative modes that arrived with "the spatial turn." Manifest in different disciplines over the second half of the twentieth century, but most especially in its late decades, the spatial turn brought p. 242 ↳ forward an understanding of space and spatial distribution as a constitutive dimension of social structure and their accompanying cultural and political and economic practices. "Space" and its distinctive companion term, "place," assumed critical roles as the terms through which not only obviously spatial disciplines such as architecture, urban planning, or geography but also the disciplines of history, social science, or literature could decipher the contingencies and the instrumental capacities of cultural objects or economic policies or political rights. Through the spatial turn, the seemingly neutral category of space and the seemingly factual category of place both acquired a new valence as interpretative concepts, with each becoming legible as the product rather than the pre-condition of social activity.

The theoretical framework of the spatial turn had several sources, central among them Michel Foucault's understanding of the spatial quality of history (with his concepts of heterotopia and the spatiality of power depending upon a view of space as a contingency of history), and Henri Lefebvre's proposition that space and place are social products, produced by the activities of social interaction and social agency.[12] David Harvey has given further emphasis to this position: "Place, in whatever guise, is like space and time, a social construct. This is the baseline proposition from which I start. The only interesting question that can then be asked is: by what social process(es) is place constructed?"[13] Edward Soja contributed to the emerging discourse of spatiality from the perspective of an urban geography, insisting that space and spatiality should be regarded both as "social product (or outcome) and a shaping force (or medium) in social life."[14] Subsequent developments of the spatial turn have not, therefore, left the equation of space and social production so one-sided, arguing further that space and place are also agents of the possibility of the social. The summary insight of the spatial turn, then, is that these two agencies—space and place on the one hand, and social structures on the other—are mutually constitutive.

That law has a geography has been evident and explicit for centuries of legal thought, and for an equally long period of geographic study. But the further implication of the spatial turn has more recently come into view: that law and geography not only coexist but that they reciprocally structure one another, such that geography produces possibilities and contingencies of law and law produces possibilities and contingencies of geography. Once space and place are no longer regarded as a priori conditions, as factual locations upon the surface of the world or neutral, indifferent containers of human endeavor, but as *processes*, then the possibility that they are entangled with the processes of law opens a different set of analytical and interpretative possibilities. A broad array of critical concepts and categories—the distinction between public and private, for example, or local autonomy, or movement and mobility—can be recognized as spatio-legal terms, p. 243 ↳ depending as they do upon the correspondence or conflict between spatial relationships and authoritative rights. The complexity of this terrain has produced calls for more deliberate engagements between the disciplines of geography and law, and for a critical legal geography.[15]

The profit of such an engagement is not difficult to see. With the uneven distribution of social advantage and power at many scales clearly registered in spatial terms, the understanding of space as a medium and place as a contingent construction render both terms as important cognates of justice, equality, and right—or indeed for their opposites. The spatial turn and the resulting juxtaposition of law and geography have brought into clear view what Lefebvre termed "the right to the city," the right of individuals and groups to participate in the construction and production of the social space of the city. This right to the city obviously involves formal legal processes such as voting rights or freedom of movement, but it also implicates seemingly tangential processes such as zoning or the regulation of commerce; it is present in the casual inhabitation of streets and rooms, but also in the highly structured conditions of property transactions and tax payments. Harvey has also adopted Lefebvre's term to signify the right to remake and change the city, collectively and with the aim of collective benefit, making the right to the city an engagement with both the cognitive and sensorial dimensions of the city, both the conceptual realm of legal administration and the experiential realm of spatial occupation.

13.3 Legal Administration of the City

In June 1333, the Assize of Nuisance in the City of London heard a complaint of a very particular conflation of spatial arrangement and urban coexistence:

> **325**. Andrew de Aubrey and Joan his wife complain that whereas they possess an easement in the use of a cess-pit common to their tenement and those of Thomas Heyron and Joan relict of John de Armenters, and the same was enclosed by a party-wall (*pariete*) and roofed with joists and boards (*bordis*), so that the seats (*cedilia*) of the privies of the [plaintiffs] and the others could not be seen, Joan de Armenters and William de Thorneye have removed the party-wall (*clausturam*) and roof so that the extremities of those sitting upon the seats can be seen, a thing which is abominable and altogether intolerable. Judgment, after the site has been viewed, that the [defendants] roof and enclose the cess-pit as it was before, under the penalty prescribed by the law and custom of the City in such cases.[16]

p. 244 Though records of the Assize contain no further details, the relationship between two aspects of urban circumstance is clearly established. The privy was enclosed by a wall of brick or stone and a wooden roof, creating a private interior shielded from public view. The wall was held in common between two neighbors, a shared party wall to which each had a legal right, and the cess-pit below the privy was also held jointly. But for an uncertain motive, one of the neighboring parties removed the party wall and the roof, exposing to view anyone using the privy and thus creating an "abominable and altogether intolerable" circumstance. The Assize ruled in favor of the plaintiff, requiring that the wall and roof be rebuilt.

The Assize of Nuisance was a medieval legal body delegated to adjudicate encroachments upon the proper use and enjoyment of one freehold property by a neighboring property. Such encroachments, termed "nuisances," were a civil matter, and, as heard and judged in the Assize, they had a physical, spatial manifestation, consisting of intrusions over property lines or dispersal of drainage outside a lot or misappropriation of party walls.[17] Party walls were a recurrent concern, and the Assize of Buildings stipulated rules for their shared construction and possession—the requisite criteria were that each property owner gave one-and-a-half feet of land in order to construct a three-foot-wide stone wall sixteen feet in height. Apertures and window openings were also a point of contention and therefore of legal regulation, with the Assize ruling that one could not create an opening overlooking or looking into a neighbor’s house unless that opening was more than sixteen feet above the ground.

Though its judgments were reactions to situations already set in place, the Assize also produced prospective codifications of architecture intended, in part, to delimit the possibilities of nuisance at a future moment.[18] Such codifications also aimed to improve the city more generally, curtailing its risks and prompting it toward more congenial states of coexistence. Fire was a paramount risk, of course, to which the Assize responded with a directive that stone or brick be used for all party walls in the city. While enforced inconsistently, this directive nevertheless gave a focus to materiality which was to become responsible for an increasing scope of judgments within the city, first the judgment of nuisance in its medieval form and subsequently in modern forms of nuisance that arose in the industrial age and with the rise of urbanization.

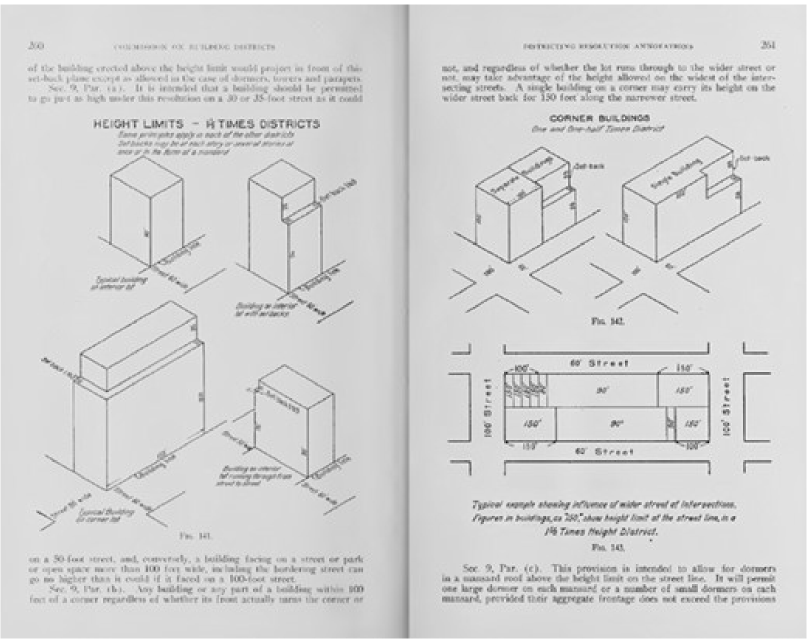
These modern forms of nuisance compelled the frequent reconsideration of the legal category and its p. 245 application, as the materials of industrialization and the spatial ↳ arrangements and structures of property ownership in growing metropolises created different types of juxtapositions. Most evident as a challenge to the capacities of nuisance law was not the older materiality of stone walls but the novel molecular materiality of airborne and waterborne pollution. Modern industries such as alkali production, large-scale potteries, or steel foundries created toxic smoke and effluvia, occluded light, and emitted offensive odors, all of which caused highly deleterious effects upon other properties. Not only neighbors but also property owners at considerable distance from the offensive source could consider themselves harmed by these nuisances, which prevented proper use and enjoyment. In Great Britain, this transformation of spatial conditions resulted in a corresponding change of legal circumstances over the course of the nineteenth century, with a common-law approach to nuisance gradually surpassed by a statutory approach.[19] Incrementally, a number of parliamentary acts imposed requirements for the abatement of smoke and other pollutants by industrial manufacturers, addressing the possibility of nuisance preventively rather than retrospectively as in prior formulations of nuisance law.

Another instrument for the legal anticipation of urban nuisance—zoning laws—arose in the century that followed. Zoning law regulated the spatial configurations of the modern city in two distinct ways, by regulating the use of land within cities (land-use zoning) and through the control of the three-dimensional mass of buildings (bulk zoning). Restrictions on the permissibility of specific uses of land for different activities and purposes had been imposed incrementally or in isolated cases in earlier centuries, but the adoption of land-use zoning as a modern technique of urban governance emerged only at the end of the nineteenth century. An early attempt by the municipal government of San Francisco to ban public laundries in most parts of the city, an effort motivated by racial discrimination against ethnic Chinese citizens, was forestalled by the Supreme Court in 1886, but a few decades later the effort by the city of Los Angeles to enforce a separation of industrial from residential areas was successful, upheld by the Supreme Court in *Hadacheck v. Sebastian* (1915). Conclusive approbation of land-use zoning was given by the Court in 1926, in the landmark case *Village of Euclid v. Ambler Realty Corporation*, following which zoning became a key component of the master plan, itself a new tool of physical planning used to direct the future growth of cities.[20]

Though presumptively beneficial in its separation of potentially incompatible activities within the city, such as industrial manufacturing and playgrounds, and as a sponsor of preservation through the zoning of historic districts, land-use zoning was also a tool used to regulate the social organization of the city. Its p. 246 most invidious function was the ↳ development and propagation of policies of racial discrimination, with its instrumental function in extensive practices of racial segregation in US cities helping to disguise deliberately inequitable and discriminatory social policies as urban improvement. Slum clearance during the decades of urban renewal employed land-use zoning for both diagnosis and prognosis.[21] Though zoning's historical legacy of racial discrimination has come clearly into view, its potential for social division remains evident in the regular appearance of stories of NIMBYism in contemporary cities. Its role in social regulation of the city has evolved, but not weakened; as the example of the re-zoning of Times Square in New York City at the turn of the millennium showed, zoning continues to be employed for the moral definition of social life.[22]

The second form of zoning, bulk zoning, imposes restrictions upon the size, shape, and position of buildings within a city. Limits on the height of buildings were introduced in various US cities during the nineteenth century, employed primarily as a means to control the aggregate physical space of a city, as in the case of Boston's limit on the height of buildings surrounding its central Copley Square. In other settings, height limits had an additional economic purpose, as in Chicago, where the persistence of speculative office buildings created cycles of boom and bust based upon demand for a greater or lesser supply of rental offices; height limits in the city were raised and lowered at different times, promoting or suppressing the available inventory of office spaces.[23] The Supreme Court confirmed the legality of height limits in 1909, in *Welch v. Swasey*, but they were only one component of the strategy of bulk zoning that emerged in the New York City Zoning Act of 1916.[24] This act regulated not only the absolute height of buildings but also their profile relative to that height. In order to guarantee that air and especially sunlight would not be excessively occluded at street level, the new zoning code imposed a formula of setbacks from the property line facing a street (Figure 13.3). At intervals, as a building rose in height its facades were to be set back a prescribed distance, creating a stepped or ziggurat form typical of New York skyscrapers of the early twentieth century. The illustrator Hugh Ferriss saw in the new requirements of bulk zoning the anticipation of new aesthetic forms distinguished by their freedom from the constraints of historicist styles that had been applied to earlier skyscrapers with aesthetically deleterious results. In the compelling renderings through which Ferriss portrayed his speculative designs for modern skyscrapers, the conflation of legal, spatial, and aesthetic thought comes dramatically into view (Figure 13.4).

Figure 13.3



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of the building erected above the height limit would project in front of this set-back plane except as allowed in the case of dormers, towers and parapets.

Sec. 9, Par. (a). It is intended that a building should be permitted to go just as high under this resolution on a 30 or 35-foot street as it could

HEIGHT LIMITS – 1¼ TIMES DISTRICTS
Same principles apply to each of the other districts
Set-backs may be at each story or several stories at once or in the form of a mansard
Typical building on interior lot
Building on interior lot with set-backs
Typical Building on corner lot
Building on interior lot running through from street to street
Fig. 141.

on a 50-foot street, and, conversely, a building facing on a street or park or open space more than 100 feet wide, including the bordering street can go no higher than it could if it faced on a 100-foot street.

Sec. 9, Par. (b). Any building or any part of a building within 100 feet of a corner regardless of whether its front actually turns the corner or

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not, and regardless of whether the lot runs through to the wider street or not, may take advantage of the height allowed on the widest of the intersecting streets. A single building on a corner may carry its height on the wider street back for 150 feet along the narrower street.

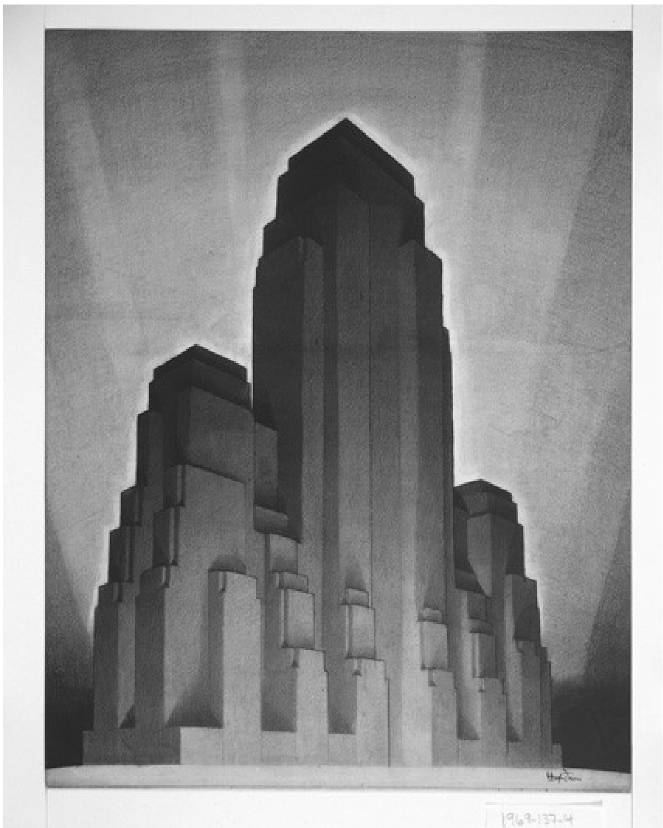
CORNER BUILDINGS
One and One-half Times District
Separate Building
Set back
Single Building
Set back
Fig. 142.
60' Street
100' Street
100' Street
150'
90'
150'
90'
60' Street
Typical example showing influence of wider street at intersections.
Figures in buildings, as "150'," show height limit at the street line, in a 1½ Times Height District.
Fig. 143.

Sec. 9, Par. (c). This provision is intended to allow for dormers in a mansard roof above the height limit on the street line. It will permit one large dormer on each mansard or a number of small dormers on each mansard, provided their aggregate frontage does not exceed the provisions

Diagrams of 1916 New York City setback requirements as a function of street dimensions and building heights.

Final Report, June 2, 1916, Commission on Building Districts and Restrictions, Board of Estimate, New York.

Figure 13.4



Hugh Ferriss, Study for Maximum Mass Permitted by the 1916 New York Zoning Law, 1922.

Cooper Hewitt, Smithsonian Design Museum / Art Resource, NY.

p. 247 From their initial formulations, both land-use and bulk zoning have evolved into increasingly complex legal instruments in the spatial, social, and economic management of the city. Soon recognized as not only preventative measures but also tools for inducement, new zoning formulas offered a means to indirectly influence decisions of the various constituents within a city, from institutions to real estate developers. In bulk zoning regulations in particular, new and intricate calculations were developed to allow for negotiations between property owners and municipal authorities representing the interests of the public. Generally known as trade-offs, these calculations allowed a private interest, such as a real estate developer, to be granted more building area than permitted by zoning in exchange for a public benefit. A developer might receive permission for additional floors above the height limit in exchange for providing a public plaza in front of the new building. Developed first in New York City in the mid-twentieth century and then widely adopted in other cities in North America and around the world, zoning trade-offs were applied not only to exchanges within the envelope of a given property but also to exchanges between sites. An owner might receive permission to exceed a height limit on one property in exchange for agreeing to build below a height limit on another property elsewhere in the neighborhood; a requirement that a new apartment ↳ p. 248 building include dwelling units for low-income residents—a common provision in cities facing a crisis in the affordability of housing—might be fulfilled by building those units in a separate property entirely, or within the same envelope but with an entirely separate entrance lobby, or “poor door,” as they have become known.

The trade-off mechanisms of bulk zoning have become a defining aspect of the spatio-legal management of the neoliberal city. Having emerged from an earlier period of more stable certainty about the distinction between private domains and public spaces, these mechanisms later followed the path laid by other instruments and techniques in the transition to finance capital, becoming less physical configurations than fungible monetary units. In New York City, the provision of public amenities evolved into what are now commonly referred to as Privately Owned Public Spaces, or POPS.[25] These are small plazas separated from the street by fences, arcades, interior plazas, or atriums, whose use and occupation can be controlled by the property owner. Though they are p. 249 ↳ provided as public amenities in exchange for considerations granted by municipal authorities, the public is not guaranteed use or enjoyment of these spaces. The signal characteristics of public space—equal freedom of access, for example, or rights to speech—are not endowments of these putatively public spaces, some of which are only degraded versions of more elaborate spaces promised in negotiations prior to the granting of planning permission. Places such as these that are encountered as urban spaces may be more accurately and more comprehensibly understood as the realizations of spatio-legal calculation.[26]

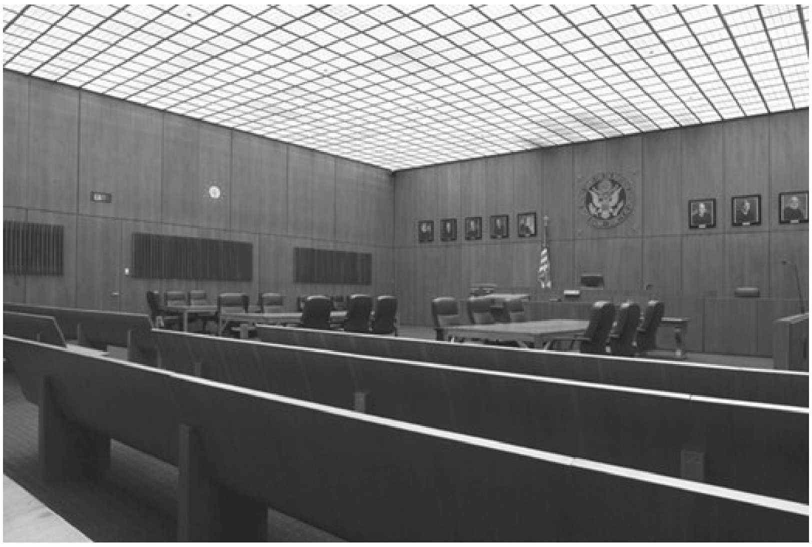
Calculations that bind together spatial consequence, design, and law are in fact fundamental to the construction of buildings within cities. Architecture has long followed disciplinary concepts and categories that echo those of laws. Precedent, norm, measure, proportionality, *regula*—these terms have a currency within the discourses of law and architecture that is more than the coincidence of shared vocabulary. In many more aspects than only zoning, the architecture of the city is circumscribed by law and legality. Building codes devised for the protection of health, safety, and welfare offer the most obvious evidence, but these are supplemented by laws designed for social consequence, such as accessibility requirements and the aim of universal design, that have clear spatial implications that make it possible to "see" law through the spatial arrangements of a building.[27] Financial regulation affects architectural forms as well, from the complex and mutable tax laws imposed on large urban buildings to the mortgage requirements that have long been decisive in producing the typicality of the single-family house.[28] From the rigidity of housing standards for minimum bedroom dimensions to the elasticity of sumptuary codes, architecture exists within the multiple contingencies of codifications fashioned to achieve a broad spectrum of social ends.

13.4 The Spaces of Justice

The 1969 trial of the Chicago Seven (*United States v. Dellinger*) included some of the more theatrical moments of courtroom history; by the time the verdict was issued, all of the defendants and their two lawyers had been cited for contempt multiple times. Charged with conspiring to incite riots at the 1968 Democratic Convention in Chicago, the defendants made persistent efforts to challenge and upend the presumptive authority p. 250 ↳ and dignity of the court. Two of them, Abbie Hoffman and Jerry Rubin, arrived costumed in judicial robes and police uniforms; their lawyer, William Kunstler, brought a Viet Cong flag to the courtroom and requested that a witness sing an anti-war song from the witness stand; and in a quickly notorious gesture, Judge Julius Hoffman ordered that Bobby Seale (an eighth defendant before his case was severed from the others) be gagged and bound to his chair at the defense table. Interruptions, profanity, and jokes accompanied the already tense arguments of judicial proceeding.

This spectacular courtroom drama took place on an upper floor of the Dirkson United States Courthouse, part of the Chicago Federal Center built just a few years before the trial, in 1964. The architect of the courthouse and the courtroom was the German émigré Ludwig Mies van der Rohe, who had by then attained an international reputation for the rigorous modern classicism of his steel and glass skyscrapers, precise in detail and expressive in their minimal palette of materials. The courtroom where Judge Hoffman presided over the antic proceedings of the trial echoed and extended the sensibility of the architecture within which it was housed (Figure 13.5). Wood veneer panels cladding each wall created an almost seamless enclosure, without ornamental trim, and the rows of seating, the advocates' tables, and the judge's bench all appeared as planar surfaces, simple and undecorated apart from the grain of the wood of which they were made. Illumination for the courtroom came not from suspended chandeliers or lamps but from a translucent ceiling, lit evenly from behind to create a continuous glowing surface above the words and gestures of lawyers, defendants, bailiffs, witnesses, and judge.

Figure 13.5



p. 253 ↳ Carol M. Highsmith, Courtroom in the Everett M. Dirksen Courthouse in Chicago, Illinois.

Carol M. Highsmith Archive. Library of Congress

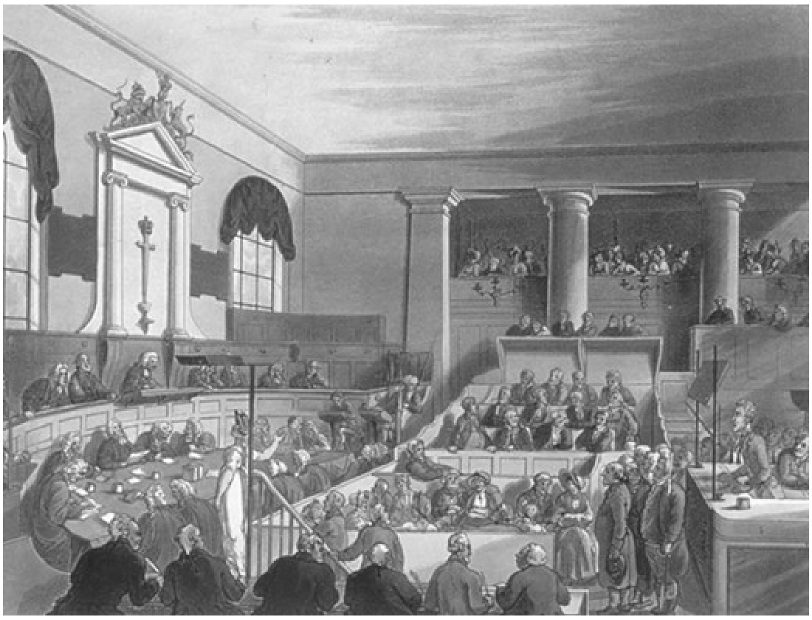
Though unmistakably modern in appearance, Mies van der Rohe's architecture possessed a palpably classical sensibility, obvious in its insistent symmetries, its legible formal and structural rationalism, and its repetition of axial alignments with an ever-present grid in spatial arrangement and in the assembly of materials. Though stylistically distinct and of an entirely different scale, Mies van der Rohe's courthouse was in many respects a sympathetic continuation of the principles elucidated by Thomas Jefferson in his proposal for a model courthouse in the early nineteenth century. Jefferson's courthouse adopted the form of a classical temple for its outward appearance and adapted the plan of a Roman basilica for its interior. In these two precedents of ancient classical architecture, Jefferson found the expression of the symbolic values of stability, rationalism, and judgment corresponding to the lineage of the system of law upon which his newly founded nation would be based. For Mies van der Rohe, the ground of rationalism was every bit as vital, even as the symbolism of Jefferson's classical ornamentation was sublimated into the aesthetic properties of the materials of glass, wood, or metal.

The judicial architecture of both Jefferson and Mies van der Rohe was an architecture of norm, an architecture of universal principles, established a priori and to be applied with the consistency of the evenly illuminated ceiling of Judge Hoffman's courtroom. In 1969, though, the contrast between this framework of rationality and the deliberate absurdism of the spectacle produced within gave vivid clarity to the role of the courtroom as a space of representation and a space of performance. From the perspective of an idealized
p. 251 system of justice, these two registers would coincide in a smooth harmony. ↳ Indeed, Jefferson paid attention to the internal arrangement of the courtroom as to its exterior in order to accommodate the adversarial system and the preeminence of the judge by way of the symmetrical disposition and the familiar elevated bench. Jefferson placed the jury to the rear of the room, suggesting that the presence of a jury in a trial court might unsettle the aesthetic symmetry of arrangement, but that the courtroom could substitute an instantiation of the symmetries of citizenship to produce the harmony of representation and performance. This harmony, though, gave way spectacularly in the trial of the Chicago Seven, with the courtroom architecture more a licensing of the exercise of capricious power—on both sides—than reasoned judgment. The very neutrality of representation permitted an accentuation of performance.

The harmony of representation and performance is indeed only an ideal of the spatial expression of the law. More often, if not always, it is a friction between these two registers that the architecture of courthouses and courtrooms expresses. The origins of the court, in the Anglo-American context, are of course peripatetic rather than static. The court was a movement rather than a place, as judges embarked upon their circuits from town to town. Only later did the court evolve into a place rather than a movement, and to a measurable degree this displacement remains an aspect of the architectural uncertainty of courthouses and courtrooms. Such architectures endeavor to produce stability against the prior mobility of their contents, and also against the variability and contingency of the proceedings they house. It is the emphatic p. 252 contingency of law that complicates its ↳ spatial representation with spatial performances, and it is the task of architecture to reconcile these two.[29]

The monumental expressions of European palaces of justice perhaps rely upon the greater presumption of stability in their statutory codes, as distinct from the contingencies of common law. But these courts too are the sites of performative arrangements. In approaching the place of the law or the space of the law, the symbolic dimensions of representation reveal only part of the essential narrative, written from the perspective of norm; there is also the dimension of performance, revealed by the perspectives of action and transcript. The artist Thomas Rowlandson, in an illustration of a proceeding in the Old Bailey, revealed a crucial device employed in that courtroom in the late nineteenth century (Figure 13.6). To compensate for the dim illumination of the courtroom, which left the face of the defendant unacceptably obscure and his facial expressions therefore difficult to discern, a hinged mirror was mounted above the dock, to reflect light from the upper windows directly upon the defendant’s face.[30] This device, likely theatrical in origin and certainly theatrical in effect, gives a physical form to the performative courtroom that necessarily accompanies the formal arrangements of the representational courtroom.

Figure 13.6



Thomas Rowlandson, The Old Bailey, c. 1808.

Rudolph Ackerman, *The Microcosm of London* (1809).

This mirror was part of a system of objects—windows for illumination, but also sound boards to amplify voices, as well as benches and tables and inkwells and blotting paper—a system of objects that constitutes a courtroom as a material space and as a locus for the enactments of legal process.[31] As the preceding examples have shown, this locus is connected to surrounding contexts of law at many different scales, and the system of objects that is the courtroom is itself embedded within the larger encompassing regimes of spatial regulation that constitute the buildings and cities and indeed territories in which they are located—different scales, imperfectly coordinated and rarely synchronous in their temporalities, but recognizable as comprising a domain within which regulatory instruments, plans, buildings, pillars, and rooms function as techniques for the projection and translation of juridical and spatial orderings.

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2 These *rollos* were also used as instruments of enforcement, serving as *picotas*, pillories for the execution of punishment. See Demetrio González Núñez, *Los árboles de piedra: rollos y picotas de la provincia de Cáceres* (Mérida, Spain: Editora Regional de Extremadura, 2004); Constancio Bernaldo de Quirós, *La picota en america* (La Habana, Cuba: Jesus Montero Books, 1948); Constancio Bernaldo de Quirós, *Nuevas noticias de picotas americanas* (La Habana, Cuba: Jesus Montero Books, 1952).

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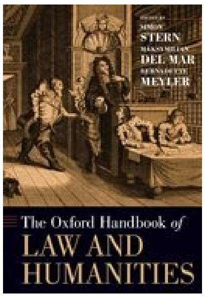

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CHAPTER

14 The Sociality of the Platform

Annelise Riles

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Abstract

This chapter explores some of the unstated assumptions of legal debates surrounding free speech on the Internet and brings into view alternative analytical categories and perspectives that have been eclipsed by these debates. Drawing on an ethnographic study of Meridian 180, a multilingual online platform, it highlights the importance of the infrastructure of digital platforms as techno-social configurations and sites of collective commitment. A focus on the platform that sustains online speech brings into view the work of hosting or preparing the speech—and the sociality it engenders. The chapter concludes that we need new categories foreign to legal and anthropological analysis alike—such as friendship—to make critical sense of the sociality of the platform.

Keywords: sociality, platform, regulation, speech, digital technologies, network, dialogue, relations, friendship

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TWENTY years ago, digital technologies were heralded as engines of a new era of public discourse and tools for social change. Internet chat rooms and messaging apps would free social activists from the Iron Cage of bureaucracy, it was believed—weakening reliance on entrenched institutions for funding and logistics and creating new *sui generis* forms of knowledge and connectivity.

The years that followed saw Arab Springs and Wikipedias, but also plenty of Facebook hacks and the Dark Web. Far from bringing spontaneous and unmediated rationality to political discourse and enabling connections across geographical and political divides, digitized conversation has become a free speech free-for-all, radicalizing passions, amplifying charismatic authority, and leading to greater balkanization of the public sphere. This in turn has led to a renewed debate about the necessity and content of regulation. My own goal in this chapter is not to generate new normative arguments about whether regulation is good or bad but to make visible the unstated assumptions of legal debates and bring into view analytical categories, perspectives, or questions that those debates may eclipse altogether.

Sociologists, STS (science and technology studies) scholars, media studies scholars, and anthropologists who have studied social media platforms have described cases in which online communities become creative sites constitutive of new identities and norms, political and otherwise.[1] But they have also shown how these platforms become “sociality factories and markets” in which users are p. 256 engaged as laborers to produce ↳ “themselves as profiles organized by marketing standards.”[2] For many scholars, the romantic Habermasian image of a new public sphere constituted of “millions of fragmented chat rooms” and of “a culture that celebrates the idea of sharing, participation, and community bonding … does not reveal the way in which connections are engineered and exploited.”[3]

Debates in legal studies have tracked the same trajectory from euphoria to anxiety. In the late 1990s, even the US Supreme Court expressed unbridled enthusiasm for what was seen as a new emerging public sphere in which “any person or organization with a computer connected to the Internet can ‘publish’ information. … Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.”[4] Although a few scholars remain optimistic that digital spaces can be a democratic force,[5] the mood has decidedly shifted. Cass Sunstein laments the dystopian prospect of what he calls the “Daily Me”—an Internet in which we encounter only the views we already hold and speech becomes “a kind of commodity.”[6] Jack Balkin similarly denounces a “new laissez-faire” era in which free speech rights and copyright protect the interests of corporate intermediaries—Internet providers and platforms—and freedom of speech becomes merely a matter of consumer sovereignty, a “freedom to consume.”[7]

The legal debate remains narrowly focused on whether and how Internet speech should be regulated. On the one hand, a libertarian view of free speech and the First Amendment grounded in ideas of the sovereign consumer and the self-realizing subject advocated by scholars such as Christopher Yoo understands online speech as an end in itself, a fundamental right, even when it is shallow, consumeristic, or hateful.[8] On the other hand, others advocate a more deliberative democratic philosophy of public debate in which speech is a means to a greater end of self-government and collective self-determination, among users envisioned as citizens rather than consumers. In this view, Internet discourse should be regulated when it undermines rather than promotes democratic self-government.[9] Balkin, Wu, and others emphasize the specific problem of Internet intermediaries—Internet providers, content search p. 257 engines, and digital platforms. ↳ They argue that the unprecedented concentration and power of these intermediaries necessitates specific regulation.[10] The legal debate remains quite circumscribed in another sense as well: although legal scholars are interested in the rise of Internet intermediaries as new institutions beyond the nation state that alter the landscape of speech, what to do about these new institutional configurations remains highly state-centered: the question remains whether and how intermediaries should be regulated by states.

This legal debate about the regulation of speech in online platforms remains at a level of normativity that makes assumptions about, but is too often disconnected from, actual online deliberations.[11] Cultural theorists have expressed frustration with the unexamined cultural foundations of the legal preoccupation with the Internet as a problem of freedom of speech. For example, Talal Asad describes how the European notion of free speech is premised on a particular set of ideas about both property and the nature of the subject.[12] He argues that in criticizing Muslim blasphemy laws, European discourse reinforces “the ideological status of European Muslims as not fully human.”[13] Judith Butler likewise describes how freedom of expression becomes the means by which a dogmatic concept of culture is imposed on immigrant populations as the precondition of citizenship.[14] Butler and Asad’s focus on transnational and immigrant speech is jarring from the point of view of legal debates that still proceed as if the production and consumption of online speech and emerging communities of citizenship tracked the boundaries of nation states. Ethnographies of online discourse in contrast have given us a different picture of online communities as transnational sites of diasporic, immigrant, and cross-national collectivity.[15]

My own interest in this problem comes from a different place. In the mid-1990s, I tracked the emergence of what were then p. 258 celebrated as new organizational forms—so-called networks—in the midst of international institutions.[16] In a parallel way to the ↳ early euphoria about digital deliberation, networks were held out as engines to solve the most intractable global problems by bypassing traditional forms of organization such as the nation state and allowing ordinary people to communicate and organize directly. Studying these new forms ethnographically, as templates for social action and knowledge production, led me to take more seriously questions of form, and to think more generally about the power of aesthetics in transnational legal knowledge. If the site and template for action now is the platform, I am interested in where, why and how people are deliberating using digital technologies, and in what else may be happening in these spaces along the way.

In the years since my investigations of the network, a new direction in anthropology, science studies, and cognate fields has emerged that foregrounds collaboration and engagement with the world as a scholarly and ethical approach after the perceived failure of grand critique on the one hand and pure empiricism on the other. We are witnessing a movement from description and critique to collaboration and experimentation, in which the artefacts of scholarship no longer only take the form of texts—they might look like social movements, artistic creations, machines, institutions … even regulatory or policy proposals.[17] In step with this work, my approach to the platform represents a departure from the classical empirical ethnographic approach I pursued in earlier work. Rather than conduct a pure empirical study of digital platforms, I have been staging an experiment in engaging and collaborating with the platform as a way both to understand and engage the politics of the moment. I consider how we might poke, tweak, or provoke the platform form, and how our interventions, risky and uncertain in their outcomes as they might be, might give us some hope in the present. At the same time, I have endeavored reflexively to study this experiment ethnographically as it has unfolded.

The narrowness of the legal conversation about online sociality might lead us to ask whether there might be other ways to think about digitally mediated deliberation, beyond the free speech paradigm, and whether other framings of the problem might suggest other challenges and opportunities, less tied to the ends of national citizenship or the means of state regulation. First, drawing on my earlier work on the network as a template for social and political action of an earlier era,[18] I reflect on the analogues and contrasts between the network and the platform in order to better understand the idea of the platform and the knowledge practices it entails. Next, I show how, far from a space beyond the Iron Cage, the platform is in fact “hosted” by a teeming bureaucratic practice. An p. 259 incident of contested speech on the platform enables reflection on the ↳ nature of hosting and its relationship to online “dialogue.” All of this brings into view something nonsensical from the point of view of legal debates about Internet speech: the emergence of friendship as an object and outcome of platform ideology and sociality.

14.1 The Platform

In March 2011, in the immediate aftermath of the earthquake and environmental crisis in Japan, a group of legal scholars, social scientists, artists, lawyers, and a smattering of others, began to think about one aspect of the evolving transnational crisis: the lack of understanding, the disconnect and miscommunication, of distrust and duplicity that plagued the transnational policy conversation. We experienced the environmental crisis at Fukushima and its international consequences as a tragic confirmation of a long-standing sense many of us had that the intellectual conversation across the Pacific and across our disciplines was far thinner than the moment seemed to demand.

In thinking about the causes, it seemed that many of these could not be adequately addressed by traditional scholarly methods: persisting language difficulties, the logistical problems and costs associated with getting busy people to spend substantial amounts of time together, and perhaps among some colleagues, a lack of a sense that the conversation is worth investing the large amounts of time that it requires in current formats. On both sides of the Pacific and beyond, certain stereotyped versions of debate elsewhere led many of us to quickly dismiss misunderstandings as the product of a lack of sophistication in other traditions.

We organized ourselves as Meridian 180, a community of scholars, policymakers, and professionals named after the dividing line between East and West that is also in folklore a place of conceptual and affective inversion, the very literal opposite of the standardizing and rationalizing space of the Greenwich Meridian. We did so without any fantasy that deliberative speech would lead to agreement or shared questions. Rather, we simply sought companionship with others who shared our experiences of crisis and doubt in our expertise.

Yochai Benkler and his colleagues have astutely warned against technological determinism in our assumptions about the universal effects of certain technologies on discourse and have shown that the very same technologies can be used in different ways, for different purposes and to different cultural and political ends.[19] In this spirit, from the beginning, Meridian 180 was an experiment in not being a Facebook, academic listserv, or another voice in the blogosphere. Its key structural features were that the conversation happened in private; that posts did not conform to the aesthetics of traditional scholarship and in particular did not allow for p. 260 practices of citation or self-promotion; ↳ and that all dialogue occurred in four languages—English, Chinese, Japanese, and Korean. These structural features aimed to ensure that interactions through Meridian 180 would escape some of the pitfalls of linguistic dominance that have plagued so many online communities,[20] and that the conversation would be the antithesis of the grandstanding and self-promotion of most social media platforms, blogs, listservs or websites.

Members likewise were carefully chosen based on recommendations from current members and evaluated for membership by committees representing different regions and language groups. Seven years after its founding, the project included over 800 members all of whom bear some close personal or professional connection to others in the project. Governance was diffused and transnational. Meridian 180 was governed by a "core idea group" comprised of a variety of nationalities, professions, and perspectives. It was staffed by an executive director and administrative assistant based at Cornell University and by scholars and staff members at each of the project's bases and partner organizations in Australia, Europe, Korea, and Japan. The funding structure —resource-sharing among universities—reflected concerns about the possible corrosive influence of advertisements or corporate partnerships as well as curiosity about the transformative impact on the academy that might come from nudging institutions that traditionally compete for resources and prestige to find ways to share.

For the first three years of its existence, Meridian 180 participants did not know exactly how to describe themselves and their work. At an early meeting of the leadership, members pondered the question of what metaphors to use. Possibilities that were proposed included "amateur think tank," "guerilla consulting group," "black box theater performance," and "intellectual gym" in which people could just get some intellectual training, side by side, with other strangers doing the same.

After the group had spent an entire day trying on one descriptive term after another at a leadership meeting in Turin, Italy, in October 2016, it was resolved that, as someone stated, "We're a platform!" A flash of recognition and excitement moved across the group. One leader with links to the tech economy expressed particular excitement: "A platform! A platform! We're a platform," he said, trying it out in different voices and with a slightly knowing grin that suggested that the term communicated the right blend of clarity and open-endedness. The group settled on a full descriptor: "Meridian 180 is a multi-lingual platform for policy solutions." Then a few days after the meeting, a person with a critical theory background, worried that this descriptor seemed too much like mainstream policy speak, wrote to urge that "and experimentation" be added at the end. A communications staff member then changed the "and" p. 261 to a "+" sign, a creative touch she viewed as appropriate to her enabling staffing role since in her view it did not ↳ alter the meaning but simply added a certain flair.[21] Meridian 180 therefore became "A multilingual platform for policy solutions + experimentation."

What did the concept of the "platform" convey, exactly? Why did it capture participants' imaginations as a description of their activities? At the meeting, members of the group commented on the difference between platforms and institutions: institutions are older, less flexible, and more locally grounded, whereas platforms rely on new information technologies to cross distances and borders of all kinds. Platforms, it was also remarked, are distinct from communities.

Thus the appeal of the platform was as a modality of techno-sociality that brings together differences by filtering and organizing conversations that otherwise would be unruly or impossible. As they are commonly understood, platforms entail diverse elements—institutions, funding, know-how, intellectual property, people, and technologies. In their heterogeneity, platforms have even emerged as new and important commodities, as well as sites of diplomacy.

It should also be acknowledged that this entire discussion was somewhat tongue-in-cheek: for Meridian 180's leadership meeting in Turin, part of the appeal of the platform identification was as a decoy. Naming something a platform took away some of the pressure to specify the purposes, practices, and outcomes to which they were committed because what exactly a platform is *for* remains open-ended: it is an infrastructure for something else, something as yet unspecified to happen—future-oriented and forward-looking.

I want to suggest that as a first step toward broadening and deepening the debate about online sociality we begin by taking the platform seriously as artefact and form. We can begin this task by comparing it to another global form I studied some years ago, the network.

In some respects, the platform is the heir to an earlier moment's network. Both "activate relational impulses."[22] Both are imagined to cross distances—geographical, disciplinary, and so on. Each manages a remarkable heterogeneity of persons, interests, and institutions through constraints of form. Both are positioned as innovations on—and against—institutions, cultures, communities, economies, and states. Both render certain forms—and only certain forms—of relationality possible and in turn render certain questions and relations unthinkable.

Yet there are differences as well. Where the network proclaimed its infinite openness and extensibility at the level of the potentiality of form, there is no pretense of infinite relationality to the platform. Platforms emerge in a world that has lost faith in unlimited relatedness. Connections with some implies also disconnections from, exclusion of, others. A platform is by definition closed; it is for some, not for everyone.

p. 262 Moreover, the platform has an *infrastructural* quality that the network did not have. Its currency is a certain fascination with technology, and with the way technology shapes social relations. While the network was amenable to critical science studies analyses demonstrating that social relations were in fact sociotechnical relations, this material turn is already baked into the self-conception of the platform. There is little need for us to restate the sociotechnical point—the platform has already made a selling point out of it.

In the *Network Inside Out*, I described the network as autosociology—a phenomenon that comes already sociologically analyzed, indeed that garners its power from the operationalization of a powerful sociological metaphor. The methodological challenge of networks was that the social science was already done, leaving a question of how to engage anthropologically. In this respect, the platform is quite the opposite: it is merely support work, for some collection of unspecified actors, actions, objectives, and aspirations. That is, while the platform is far more than a self-description—it is an infrastructure—what and who the platform is *for* remains unknown (hence the possibility of the platform nomenclature as decoy). In this respect, the platform is far more future-oriented, and incorporates heterogeneity in a different way: not by pointing to its own form but by gesturing to a relational possibility beyond itself. If the network was a sociological autodescription of relationality, the platform is a support structure for relations still unspecified.

There is another interesting difference: the network, as I discussed, was a self-scaling device; it replicated the same form at every level of scale. A global network integrated regional networks, which in turn integrated national networks of the same form and kind, and so on. Platforms, in contrast, cross not scales but technical and material types. Scale has been displaced by technology as the given marker of powerful differentiation. The Meridian 180 platform was composed of other platforms: the whole of Meridian 180's interactions and technologies in turn relied on what participants term a "digital platform"—meaning the digital technology on which translated member interactions occur—and this digital platform in turn fed into what they termed a publications "platform" for outputs hosted by a partner organization, which in turn also incorporated a further web-based discussion "platform" created by a university press with funding from a large foundation that allows the wider public to interact actively with those outputs and continue discussions about those outputs online.[23] Unlike in the case of fractal networks, these platforms were not self-similar, nor were they necessarily differently scaled. Rather, they entailed different sociotechnical configurations. All were of equal reach but did different things, thanks to different technologies and institutional structures.

An earlier generation's fantasy of crossing geographical distances instantiated in the network has now become the stuff of mundane
p. 263 bureaucracy: videoconferencing, email, and so on. In contrast, the fantasy now lies elsewhere, in the technology itself. ↳ The
digital has become its own focal point (a site of power and agency)[24] in a way that technologies of communication were not yet fully
in the networks of the 1990s. This in turn brings attention to work—a category of activity that was largely erased in the network.
Networks, in contrast, were imagined to simply spring up *sui generis* in response to activist needs.

14.2 Infrastructure

So let's turn now to the infrastructure, what the platform celebrates about itself. Taking on infrastructure requires going beyond what Meridian 180's members and leadership may say about it, to explore the practices of the platform.

At the center of all this activity was indeed a concrete piece of infrastructure: a digital platform for multilingual online conversation. Members participated in online forum discussions, and encountered one another through the technology. The authority and agency of participants were shaped by this technology of contact. Members were free to ignore or shirk the expectation that they read and contribute to ongoing discussions by failing to open emails generated by the system, for example. For their part, staff were continually devising ways to capture the attention of members and enlist their participation through new bureaucratic artefacts such as email newsletters or through changes to the digital architecture such as features that demand a member post their photo or bio to present themselves to others before they can view the site. Likewise rigid limitations on the dialogue were baked into the technological platform—for example, the system will reject comments over a specific length. The dialogue was structured by express platform rules—such as a strict rule against sharing any of the discussions with non-members—and by implicit norms—such as the norm against using a post to promote one’s own work. However, members sometimes found ways to subvert these rules, norms and technological constraints—by posting multiple posts in succession to circumvent the length limit, or by adding hyperlinks to their work in their posts.

The platform was originally built by a small Ithaca-based software company under the guidance of a humanities doctoral candidate working as Meridian 180’s project manager. Endless tinkering, the departure of the doctoral candidate for another university, and technological change eventually led to the total breakdown of this rickety artisanal technology without possibility of repair. In 2017, in what all interpreted as a major achievement, a new digital platform was launched. The technology was built this time by a large corporate translation company, in collaboration with staff in Ithaca, New York, Seoul, and Tokyo. It was a bureaucratically and entrepreneurially complex project of developing strategy, raising funds, solving technical challenges, creating new “branding,” resolving legal issues, reaching agreement between institutions on protocols for cost-sharing, and much more.

p. 264 What this sketch of the digital infrastructure demonstrates is that despite the pervasiveness of the ideology that dialogue somehow spontaneously produces itself, these online conversations are sustained only through elaborate, if rickety, social and institutional scaffolding constantly in need of replacement and repair. Indeed, the work of producing Meridian 180 demanded complex assemblages of people, technologies, and institutions. Eight partner institutions served as regional “bases” hosting an office and staff and providing both a budget for translation work and a member of the Core Idea Group. Meridian 180 was staffed by full, part-time, hourly waged and volunteer workers of different disciplinary and linguistic backgrounds in seven cities, many of whom had never met in person. They held weekly videoconference calls and collaborated through Basecamp, a web-based collaboration tool for teams that allowed for team members to assign to-do’s, chat, share documents and calendar events, email, and to participate in shared databases, shared project folders in the cloud containing spreadsheets, publicity documents, photographs, and other materials. There were people to hire, and to fire, students to recruit, members to motivate and inspire, and serious institutional constraints and cultural barriers to overcome.

As the disintegration of the earlier digital platform suggests, moreover, the platform is a field full of “glitches” in the STS sense of the term—documents lost or mistranslated, messages miscommunicated, institutional turf battles, videoconference meetings missed due to incorrect calculations of time zone differences, emails intercepted by spam filters, people who misread one another’s intentions, technologies that failed to inspire, or broke down altogether. Staff deployed email, Basecamp, and weekly videoconference meetings in order to cajole, shame, or encourage teammates to contribute labor, and to evaluate one another’s work, but videoconference meetings could be missed, to-do’s could be ignored, and emails could go unanswered. For me as a participant observer, Meridian 180 was experienced on a day-to-day basis less as a long list of problems and to-do’s. Thus while Meridian 180 is in its mission a move against traditional institutional culture, it is in many respects a standard bureaucracy.

In particular, the technologies and the bureaucratic practices divided participants and activities into two distinct spheres. The videoconferencing, Basecamp, and file-sharing technologies were reserved for leadership and staff; members did not use them and indeed are not deeply aware of the details of the infrastructural underpinnings of their deliberations until they come to play some kind of leadership role in the project. Likewise, staff rarely participate in the online dialogues and hence do not access the digital platform as participants, although they constantly manage “the back end,” as participants fail to properly post their comments, or a bug in the software causes the system to go down, or the translation company produces queries or demands for payment. On one occasion I asked a staff member to summarize the members’ online conversations and post the summary in her own name on the platform. Her discomfort with the task—her statement that “this is not really my job”—reflected her understanding of a division between two groups of participants—the “staff and leadership” on the one hand who do the bureaucratic work of sustaining the
p. 265 platform, and the “members” who engage in a different kind of sociality through the platform, a division instantiated in the ↳
technologies. The staff and leadership are what we might call the sociotechnical hosts, those who invite the members to the digital gathering and engage in elaborate preparations designed to produce particular effects in their guests and hence call forth a

collectivity even as their own work is eclipsed in the moment of dialogue.[25] The infrastructure of the platform, then, is a matter of hosting.

But the Weberian frame does not entirely capture the temporal directionality of platform work:[26] there is a future orientation to all of this work on behalf of the platform.[27] This bureaucracy aspires to bring something (as yet not fully articulated) into being. All of this activity is understood to be in the service of *building* the platform itself. For participants—the staff, the leaders, and the dialogue participants alike—Meridian 180 is still a fragile entity, something that needs to be brought into existence by writing funding proposals, retooling the physical platform, holding committee meetings regarding new members, organizing annual membership meetings, producing forum discussions and policy outputs, and contributing to intellectual discussion. We will come back to the future orientation of hosting and being hosted toward the end of this chapter.

14.3 Speech

Let me now bring this ethnography to bear upon the legal framing of the question of platform sociality as a matter of the regulation of speech by engaging with the conversations that ensue in this platform—what the Meridian 180 technocracy is imagined to be *for*. Legal anthropologists have long found that one of the best ways to study social practices is through cases of conflict about those practices.

Some time ago, the postdoctoral scholars who served as translators began to point out that the views represented by our membership did not reflect the full political spectrum. If we were to have a true impact, then we needed to find a way to bring into the conversation more nationalistic and more politically conservative points of view—the kinds of points of view that arguably are leading to greater tension in the Asia-Pacific region.

As it happened, I was introduced to an ideal candidate—a high-ranking member of the political staff of the US Republican coalition in Congress, someone directly responsible for making US policy toward Asia who held both a law degree and a doctorate in political science with specific expertise in China, and who claimed to be a zen monk and former navy commander to boot. We invited him to join the membership and he accepted.

His first few posts were just as expected—brilliant, on point, creative, scholarly more than political. Then in a conversation on a different topic, he launched into an inflammatory attack on the corrupt and oligarchic nature of the Chinese government and of the intellectuals in our group who, he said, were on the Chinese government's payroll.

Remarkably, perhaps, nothing like this had ever happened before (and nothing like it has happened since). The Chinese member of the Core Idea Group (CIG), a senior legal scholar, panicked. This would make our members in China very uncomfortable and might prompt them to withdraw from the project because they would suspect it of being a covert vehicle for pushing a US nationalist point of view. What bothered the three anthropologists on the CIG was something slightly different: the post demonstrated no interest in engaging our Chinese colleagues; it left no room for them to intervene or respond. The tone seemed to be aimed not at our Chinese members but at a US audience of individuals who already held the views expressed there. It was inward-looking. The incident exposed, in its violation, a deeply held commitment or norm of the platform.

The next morning, I phoned the individual and asked him to revise the post. I explained that I wanted him to visualize the Chinese members as if they were in a room with him and ask himself if, in a non-digital environment, he would make his point in the same way. I pointed out that while many of our Chinese members might actually share his political points of view, it would be highly awkward, if not impossible, for them to participate in a conversation so directly critical of their government. He responded swiftly and angrily. In his view, this was matter of free speech: he had a right to say what he wanted to say, and he did not want to participate in the habit of US sinologists of "self-censorship" in order to avoid offending Chinese sensibilities.

He accused me of anti-US bias. I tried to entice him into thinking about what reaction his comments would provoke and how this might be productive or unproductive. But he would have none of it. "I participate in six or seven listservs where Chinese members spout nationalist propaganda and I am expected to behave like a gentleman," he said. When we ended the call, he made some very minor revisions and resubmitted the piece, defiantly. Within its own logic, this individual's free speech argument made perfect sense:

here was a person who understood himself in the Libertarian sense to have a right and a duty to speak freely, no matter the consequences for the laboriously created community he had just joined.

I should also point out that this individual was the very first member who did not have relatively strong social ties to another member of the project. Thus one of the first observations we might make about this incident concerns the relational foundations of this platform. We can also observe that the management of the problem was classically bureaucratic. The offending behavior was flagged by employees who took it up the chain of command, and a solution was worked out by a leadership committee that delegated to me the role of enforcing its decision. Several members of the committee pointed out that the incident revealed the need for a handbook of policies for future use.

Yet in his refusal to compromise, this individual had posed a direct challenge to the technocratic agency of the platform and its p. 267 leadership. Thus the leadership was faced with a choice. Should we refuse to post the comment or should we allow it to go forward? ↳ A debate ensued that brought the group back to a consideration of the original purposes of Meridian 180—the question of living our limitations and failures as experts together, side by side, as a way of engaging difference. The group finally concluded that we had been graced with an opportunity to experience the multivalent potential of the politically charged moment of culture shock,[28] a moment that could go any way—toward mutual understanding, toward chaos. Consciously holding that pose, staying in that place together, would be hard work but if we could achieve it, we might claim it as both a scholarly and ethical intervention. The leadership and the staff held our breath and let the post go forward.

What happened next was quite unexpected: other members stepped in. The discussion leader, a Korean scholar with experience in politics, deftly steered the conversation in another direction. Rather than responding in kind, our Chinese members ignored the post entirely and continued the dialogue. Our Chinese postdoctoral scholar, who had a recent doctorate and was serving at that time as translator, reacted entirely differently from my senior Chinese colleague to the post. Young Chinese scholars had heard all this before, and even agreed in part with some of the sentiment. Certainly they knew how to *ignore* the rest in order to focus on what mattered about our conversation, much in the same way one ignores advertisements or pornography on social media platforms, he said.

How do we make sense of this episode from the standpoint of the legal framing of platform sociality as a problem about the regulation of speech? In this case, the problem of offending speech that had the potential and even the aim to harm, to silence, and perhaps to bring the entire platform down was not resolved by restricting speech, as many legal scholars would propose to do in such cases. Yet at the same time, the speaker's libertarian-minded intervention did not prevail. Rather, in the cruelest form of online punishment, it simply fizzled, and was ignored. Indeed, the speech, as offensive and attention-getting as it aimed to be, turned out to be simply beside the point.

What had happened here is that the members read this post not as a threat to a particular group of members or a political point of view but rather as a potential threat to the platform itself and its still inchoate *future*. They responded, in a variety of ways, from ignoring to changing the subject, out of commitment to the platform. What oriented their response was not rules, norms, or policies regulating speech but commitment—commitment to the platform.

This incident reveals the significant difference between the standard ideal of online free speech dialogue and the premises and promises of hosting and being hosted. I believe we can read this collective response from the membership as a return on a technocratic gift, a recognition of the labor of staff and leadership in hosting something in the process of becoming that, as is always the case with returns on gifts, reoriented the collectivity toward the future.[29] The protective and forward-looking response of p. 268 members to a purposeful violation of the implicit norms of the platform brought into view a ↳ collectivity that transcended the specific content or subject matter of its dialogue. It entailed both an acknowledgment of prior gifts and an anticipation of a future possibility of further responsiveness to one another.

Legal scholars who think about platforms are for the most part concerned about the effects of new arenas of speech on existing polities. In its most sophisticated form, the legal debate has focused on the kind of knowledge that emerges from different online platforms—the contrast between platforms where participants merely consume knowledge and platforms where participants produce as they consume and hence create in collaboration with others.[30] The ultimate concern in this debate is the consequences for citizenship as scholars call for platforms that produce citizens and not consumers. Yet the case I have described reveals Meridian 180 members as neither consumers nor producers of *content* but as participants engaged in building the platform itself, together.

In focusing on the content and quality of online discourse as it relates to existing offline institutions, legal scholars may be ignoring the more interesting and radical phenomenon of emerging forms of social organization as sites of collective commitment. Rather than analyze the platform in terms of its effects on the existing polity, therefore, we might take the platform much more seriously as a form of technosocial organization—to recognize how, in the commitments that it garners, across national boundaries and existing citizenship and identity categories or ideological divides, it becomes something on par with the polity itself. In the case of Meridian 180, what people were committed to, it turned out, was not ideas or content or speech but the building and the future of the platform. The critical task then would be not to square the circle on freedom of speech versus equality but to analyze the differences between platforms and between the kind of commitments they generate.

But why should people be committed to the platform? What is the source of the commitment? The answer challenges us to expand the categories of both legal studies and anthropology.

14.4 Friendship

As we have seen, digital platforms are a matter of infrastructure, and infrastructure must be maintained. Technologies have needs, and those needs give people something to create, some collective work to do. Collective work on and for the platform, oriented toward the platform’s future, in fact demands quite ordinary and mundane investments of time and labor, and with them commitments to and reliance on other people. Ironically for all its presumed novelty, the platform infrastructure is the stuff of traditional social anthropology—social relations and all the hierarchies and politics, but also aspirations and creativity those relations always entail. Might we find some hope in this mundanity?

p. 269 For six months, a lawyer in Singapore, a lawyer in Brussels, a doctoral student in Germany, and I worked together daily over email and videoconference to prepare a conference of the membership in Brussels. Although I had met each person independently in other settings and had an attenuated professional relationship with each, they had not met one another in person and hence this intensive and consuming work evolved online. The work was oriented entirely toward an anticipated future moment, a few months away, in which we would welcome participants to what we hoped would be an impressive and exciting dialogue. We came to share a commitment to this event and to rely on one another in myriad large and small ways, and sometimes on the sidelines of our videoconference calls we chatted briefly about other matters in each of our lives—children shuttled back and forth between divorced parents, job searches, and so on. In the end, we viewed the conference as only moderately successful. But we were surprised by something else: over the course of six months, we had become unlikely but intimate friends. As we toasted the closure of our conference, each person commented in passionate but also somewhat puzzled terms about how much the relationships we had developed had meant to him or her, and how serendipitous and unique these relationships were from the standpoint of usual interactions in law firms or universities. Each expressed sadness that our daily conference calls at odd hours of the morning or night to accommodate time differences would now come to an end.

Participants in Meridian 180 are often taken off guard about the kinds of relationships that emerge in the course of working side by side on this or that piece of the rickety infrastructure. This certainly was not an originating ambition of the project, nor were these serendipitous relations part of the original strategic vision. What is perhaps most difficult to square with existing theories or critiques of digital sociality is that these relationships emerge not from the online speech but from the work of hosting or preparing for that speech—the sidelines work of attending to infrastructure, for the sake of *other* speakers. Relations inhere not so much in speech as in the future-oriented bureaucratic gifts the infrastructure demands.

Legal scholars have sought to make sense of the sociality of the platform in terms of the potentiality of online spaces as sites of amateur collaboration.[31] Jack Balkin in particular has attempted a less instrumental understanding of digital sociality by effectuating a classic analytical turn to “culture” as something different from, or beyond instrumentalist legal reasoning.[32] He has argued that the goal (of speech regulation) should be to promote a “democratic culture” online in which ordinary people can have a say in the development of the cultural forces that in turn produce them. Balkin rethinks the individualist orientation of legal free speech debates in light of this relational quality where he emphasizes that free speech rights are intersubjective, “not self-regarding.”[33] Yet from an anthropological point of view, culture is not quite the right analytical move here. In its holism and its settled dimensions (ritual, p. 270 symbolism, materiality, etc.), the culture category cannot account for the ad hoc, precarious, and quite unexpected ↳ quality of the relationships that emerge in the practice of hosting. So let’s try the indigenous terminology—friendship—on for size.

Friendship is not a subject anthropologists feel terribly comfortable with. The meager anthropological literature largely frames friendship as a relationship grounded in personal choice, in contrast to kinship relations in particular that are taken as given. But as soon as this contrast was framed anthropologists noted its inadequacy as many kin relationships are in fact matters of choice while friendships are reframed as “fictive” kinship relations.[34] In the case of the platform, this focus on personal choice fails to capture how friendship emerges serendipitously, without expectation, as a kind of side effect of the work of hosting. What defines these relationships as friendships, rather, is that they emerge outside given institutional or professional frameworks.

In his ethnography of sociality in a Papua New Guinea prison, Adam Reed observes the emergence of a powerful new category of relationality within the prison, “friendship.” Friendship, he explains, is distinct from one’s Wantok associations with people of the same language group, and distinct again from kinship, or even one’s bureaucratic status (prisoner or prison guard). For prisoners, it is a highly charged, new relation, something curious, unexpected, precious, and intimate. Reed analyzes friendship as an artefact of constraint—constraint on movement, routinization of prison life, separation from the outside world—the same forces an earlier Foucauldian analysis might identify as producing individuals.[35] As Reed suggests, by definition, it is a kind of relationship that exceeds and yet draws its energy from the constraints of given social and organizational forms. Here, the online dimension of friendship is relevant to the extent that it facilitates these connections, beyond the user’s institutional context, after hours, across locations. In Reed’s terms, the technology—in particular the work the technology demands—provides the constraint that allows a different relationship to emerge.[36]

Friendship is, of course, the stated promise of many social media platforms. Sites such as Facebook promote digital technologies as new ways to expand the reach of one’s friendships; “in contrast to the Aristotelian conception of friendship as something rather precious that one cannot have with many people at once,”[37] they market the promise of a new, infinitely expansible range of connectivity through devices such as “like buttons” that provide a “cost-effective way to maintain and perform friendships.”[38] Facebook, Linkedin, and other sites promote themselves as tools for making and maintaining friendships, themselves understood as a p. 271 kind of currency instrumentalizable for a wide ↳ variety of purposes—from finding a job to getting travel advice. Media studies scholars observe that this marketing of friendship coexists with an epidemic of loneliness in many segments of contemporary societies and critique online platforms for preying on their users’ desire for human connection. They emphasize, for example, “the qualitative differences between offline and online friendships,”[39] and draw a contrast between “connectivity … engineered by software” and (true) connectedness.[40]

Yet what is different about the friendships I have described is that Meridian 180 does not promise friendships—rather, it promises dialogue. But dialogue in turn requires all kinds of technical and bureaucratic maintenance. It requires hosting. And hosting translates into concrete projects that, in the doing, translate into quite ordinary social relations. These relations are a surprise to participants perhaps because of the ideology that what matters in the platform is the dialogue, the front end, the speech—that the back end is just support work, just hosting.

This brings us back to where Meridian 180 began, with a political and environmental crisis that was also epistemological and ethical, a crisis of expertise. Perhaps in the marketing of friendship, Facebook and its peers are in fact onto something; perhaps friendship is in fact what remains and sustains at an epistemological and political moment after the failure of states and of knowledge alike. If that is so, then the ultimate cruelty of Facebook and the like is their denial of access to the conditions of actual friendship—the creation and collective maintenance of the infrastructure itself—while perpetuating the mirage of friendship as merely a matter of dialogue. Perhaps the issue then is not the rules we maintain for online speech but rather the conditions of possibility for constructing platforms of our own making.

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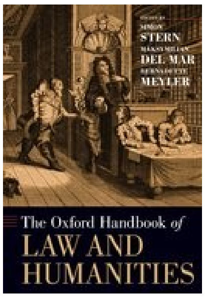

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CHAPTER

15 Personhood

John Frow

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Abstract

Legal personhood is distinct from and dependent on ordinary understandings of what it means to be a human person. Yet not every human being is a person (slaves are not, for example), and there are some non-human entities (such as corporations) which are. The legal category of the person is thus at once continuous and discontinuous with that of the natural person, designating a subject of rights and duties along a spectrum from full to very partial personhood. Moreover, the mode of being of natural persons is by no means self-evident, because the status of the "natural" person is itself constituted by a juridical demarcation of the boundaries of embodied human being and by distinct institutional and practical conditions of constitution, and natural persons are not necessarily coextensive with their bodies. While Western models of personhood are based on the coherence and continuity of the self as rational or ethical substance, quite different ways of understanding personhood are found in other cultures, where persons may be taken to be the sum of their social relations or of the exchange of substances between their bodies and the rest of the social and material world. Similarly, in most cultures persons are constituted by their relation to the generations of the dead from whom they inherit, to the gods, and to the unborn descendants to whom property and some of the components of kinship (a name, a status, a genetic inheritance) are to be passed on.

Keywords: legal person, natural person, corporate person, persona, citizenship, slavery, dividuality, partibility, permeability, eschatology

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15.1 Legal and Natural Persons

THE word “person” carries a set of everyday meanings in English which make it roughly equivalent to “human being.” We speak of someone being “a strange sort of person,” or a “person of interest” to the police: a generalized member of the human species. When we say someone is appearing “in person” (rather than appearing virtually or being represented by an agent), or speak of offenses “against the person,” the word refers more specifically to human embodiment, although because it is genderless the reference is less to a particular embodiment than to the fact of embodiment itself. When we use the word in the plural —“persons” rather than “people”—it carries a somewhat more abstract, perhaps more bureaucratic sense. And when we speak of “personhood” the word becomes more abstract still, referring to the civic status of human beings.

In all these cases we assume that the fundamental reference of the word “person” is to an embodied human being. Yet not every human being is a person (slaves are not, for example), and there are some non-human entities (such as corporations) which are. In its Roman origins the term “person” originally designated not a human being but a social role and a civic status. The Latin term *persona*, which is probably of Etruscan derivation and is perhaps a borrowing from the Greek *prosōpon*, “death mask,” is the word used both for ritual and ancestral masks and for the mask used by actors in the theatre.[1] Rather than designating only the mask, though, it probably also signifies a socially recognized *right* to wear the mask that corresponds to one’s place in ritual ceremonies or to one’s ancestral lineage. It is from this second sense of a social right, p. 274 together with the obligations that accompany it, that we can trace the evolution of a ↳ conception of personhood as a legal responsibility for one’s acts and the capacity to hold and to exercise rights.

In one sense these rights are united in an individual, but in another, they are located not in a physical self but in a mode of identity imputed to any subject engaged in legal relationships. This second sense of *persona* emerges only in the fifth and sixth centuries of the common era, and designates not a role but a constant juridical personality, an inherent capacity to fill the appropriate legal roles. Thus subjects “have” or “don’t have” a juridical personality (*personam habere*), and this personality has nothing to do with what they are “independently of the law as living and social beings.”[2]

This conception changes in the Middle Ages under the influence of Christian theology, for which Christ is the archetype and fulfillment of human personhood, the redeemer in his own person of the fallen human nature of Adamic mankind. The essence of his being is that he is the incarnate form of God, consisting of two natures, human and divine, but having one person; and that person (*hypostasis*) is one of the three persons of the Trinity, distinct, coequal, co-eternal, and consubstantial in the unity of substance of God. Christ is, in brief, at once a fully human and suffering person and the promise of glorified personhood in its reunion with the God from which it has been separated. After many centuries of doctrinal debate about the person of Christ and the relation of the carnal to the spiritual, the person thus comes to be understood as the unity of the two distinct and irreducible substances of body and soul. The person and the biological human being are thenceforth fused in a unity in which the *persona* is an ontological rather than a functional entity, and is anchored in the body. As Christian doctrine and Roman law come to be reconciled from the thirteenth century onward, however, this substantial unity leads to a dichotomization of the “fictive” legal person and the “real” natural person. The subject to whom rights are imputed is imaginary, having neither body nor soul; “real” persons, by contrast, “formed a blend of reality and fiction, a mix of concrete existence and law, a hybrid which could only with difficulty be disentangled.”[3] When humanism subsequently undertakes a systematic and synthetic account of rights, the *persona* can then easily be decomposed into its constitutive elements, emphasizing the juridical and functional value of the legal *persona*.

The legal category of the person is thus at once continuous and discontinuous with that of the natural person. The core of the argument is this:

> A person is such, not because he is human, but because rights and duties are ascribed to him. The person is the legal subject or substance of which the rights and duties are attributes. … Every full citizen is a person; other human beings, namely, subjects who are not citizens, may be persons. But not every human being is necessarily a person, for a person is capable of rights and duties, and there may well be human beings having no legal rights, as was the case with slaves in English law.[4]

p. 275 Roman law allows for one individual to have multiple *personae* according to the legal role he is playing (that of owner, of inheritor, of plaintiff …), or for several individuals to constitute a single person (as when a father and son jointly inherit); a slave jointly owned by two masters may be deemed to have two distinct persons (or more correctly *vicarious* persons) when he or she acts on behalf of one master in relation to the other. It is still the case in Western law that "legal persons may be different aspects or dimensions of a single human being," so that an individual may, for example, "transfer property to himself as trustee, or do business with himself as a member of the firm to which he belongs, or, in a triple capacity, as an executor he can transfer property to himself as a trustee."[5] Thus "the law composes 'persons' by effecting a veritable dissociation of subjects and bodies,"[6] such that the unity of the person is not necessarily equivalent to a physical or psychological subject.[7]

This distinction between "legal" persons and "natural" persons cannot be mapped onto a simple dichotomy of culture and nature, because the status of the "natural" person is itself constituted by a juridical demarcation of the boundaries of embodied human being: boundaries between fetus and child; between the living, the comatose, the brain-dead, and the dead; between the bodies and persons of Siamese twins; between the normal and the subnormal. The European Court of Human Rights, overruling the legal principle of the inalienability of juridical identity, has now recognized the right of transsexuals to reassign their birth identity.[8] Moreover, "natural" persons are not necessarily coextensive with their bodies. They may, for example, be represented by an agent, acting as a legal extension of their status as person and able to create rights and incur duties on their behalf.

Both this constructedness of the natural person, then, and the distinction between legal and natural persons mean that there can be no general concept of "person" with a necessary or unified form. Processes of registration and certification (birth certificates, identity documents, certificates of incorporation …) control the recognition of the status of both corporations and human beings. The natural person has distinct conditions of constitution (specific institutional and practical conditions), and is conceptually distinct from the juridically constituted person. Yet, while the clarity of this distinction matters deeply for and within the law, it has little purchase on everyday usage, where there is a constant leakage between the subject of rights and embodied individuals. We routinely and intuitively conflate legal with moral responsibility, and legal with human rights; and we routinely and intuitively assume that non-human persons are artificial or fictitious, and that "natural" persons are the natural form of the person.

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15.2 Individuals and Dividuality

The mode of being that we call the natural person, and by extension the moral person, is specific to the Western philosophical and religious tradition as it has evolved in all its complexity over several millennia. Its key components are a conception of the person as a rational, self-conscious individual continuous with its own past states, continuously responsible for its past and future actions, and carrying the rights and responsibilities that accrue to a human being with both capacity and competence.

At the beginning of this tradition stand the legal and civic conception of *persona* and the Christian theological conception (with deep roots in Greek philosophy) of the person as—to use Boethius's seminal formulation—*naturae rationalis individua substantia*: an individual substance of a rational nature. The modern elaboration of the concept extends well into the moral philosophy of the present, but its key moments occur in the (long) eighteenth century. Let me isolate the two most commonly cited. The first is Locke's argument that

> what *Person* stands for … is a thinking intelligent Being, that has reason and reflection, and can consider it self as it self, the same thinking thing in different times and places; which it does only by that consciousness, which is inseparable from thinking, and as it seems to me essential to it. … And as far as this consciousness can be extended backwards to any past Action or Thought, so far reaches the Identity of that *Person*; it is the same *self* now as it was then; and 'tis by the same *self* with this present one that now reflects on it, that that Action was done.[9]

Locke then goes on to question the possibility of continuous recollection, and thus the continuity of this conscious self: consciousness is "interrupted always by forgetfulness," the whole of our past is never simultaneously accessible to us, and we are mostly not focused on the past (and indeed have no consciousness at all in sleep). All of this raises doubts as to "whether we are the same thinking thing, *i.e.* the same substance or no"—a problem that he then dismisses by saying that the question is "what makes the same *Person*, and not whether it be the same Identical Substance, which always thinks in the same *Person*, which in this case matters not at all," since in principle the same person could inhabit different substances—that is, different bodies.[10] Conversely, if one man could have "distinct incommunicable consciousness at different times," he would be different persons at those times: he will not, for example, be punished for acts he commits while deranged—while he is "not himself" or "besides himself."[11]

We could call this formulation (as Kant later does) a psychological understanding of personhood, although p. 277 as Daniel Dennett points out it also has a forensic dimension ↳ insofar as it makes this continuous self both morally and legally responsible for its past and future actions.[12] We could call the alternative formulation proposed by Kant an axiological conception. Kant puts it as follows in *The Metaphysics of Morals*:

> A *person* is a subject whose actions can be *imputed* to him. *Moral* personality is therefore nothing other than the freedom of a rational being under moral laws (whereas psychological personality is merely the ability to be conscious of one's identity in different conditions of one's existence). From this it follows that a person is subject to no other laws than those he gives to himself (either alone or at least along with others).
>
> A *thing* is that to which nothing can be imputed. Any object of free choice which itself lacks freedom is therefore called a thing (*res corporalis*).[13]

This conception posits a certain notion of species being—the ability freely to choose one's actions and their consequences—as the core of personhood, whereas a "psychological" conception grounded in the capacity for rational thought might, for example, disqualify those who are fully human but mentally impaired, and might, conversely, attribute personhood to intelligent non-human primates. What Kant manages to do is avoid both the problem identified by Hume that defining selfhood in terms of continuous self-consciousness might make the self disappear altogether (since "when I enter most intimately into what I call *myself*, I always stumble on some particular perception or other, of heat or cold, light or shade, love or hatred, pain or pleasure. I never can catch *myself* at any time without a perception, and never can observe anything but the perception"),[14] and Locke's dualistic spiral between bodies and persons (which Kant instead replaces with a dichotomy of persons and things). In Kant's formulation, the conflation of the person with human species being lays the ground for an identification of moral personhood with the juridical subject of rights and responsibilities, and indeed it grounds all later notions of human rights in general.

How does the category of person relate to that of the self? Charles Taylor, who has written the most comprehensive account of the history in Western thought of the category of the self, speaks of its connection with "modern inwardness, the sense of ourselves as beings with inner depth,"[15] and notes that the self is necessarily experienced from within, not as "an object in the usually understood sense. We are not selves in the way that we are organisms, or we don't have selves in the way we have hearts and livers";[16] we are selves to the extent that things have a significance for us that is conveyed in ↳ language and in our p. 278 relation to other selves. But Taylor's account of the category is teleological: despite the historical differentiations he makes in charting the course of the self from classical antiquity, Taylor's notion of the self is a notion of the successive mutations of a continuously developing entity which reaches its fullest form in modernity.

To make this critique is not, of course, to deny the existence of subjectivity in any human society, nor of its peculiarly inward modern form; it is to say that the forms in which that subjectivity is experienced and the relations it holds to that of fellow human beings and to the natural and spiritual world are always structured by networks of practice and technique—aesthetic, legal, ethical, religious, civic, and so on. In this sense, the category of the self (like that of the soul) is a subclass of the category of the person. It is not a moment of self-intuition but a sense of location in relation to "several arrays of other beings," as well as the sense of having a distinctive set of attributes; self is "the collected attributes of a person."[17]

The Western conception of the individual and "natural" human person is not a universal—indeed, it is culturally and historically anomalous. Clifford Geertz writes that "the Western conception of the person as a bounded, unique, more or less integrated motivational and cognitive universe, a dynamic center of awareness, emotion, judgment, and action organized into a distinctive whole and set contrastively both against other such wholes and against its social and natural background" is "a rather peculiar idea within the context of the world's cultures."[18] Calling this conception "Western proprietism," Marilyn Strathern argues that it finds expression in one of two complementary propositions: either the person is a unitary self with the power freely to alienate its possessions or to acquire possessions which become a separable component of its identity; or the person is conceived as identical with its activities and loses its unitary identity when the products of these activities are alienated from the person. In both cases the person is self-possessed and self-contained, separate from the world of social others; things have a singular value in relation to the person, and it is the external social world that gives things the plurality and diversity of their value. This assumption runs counter, however, to the supposition of many traditional societies "that persons are intrinsically plural and diverse in origin and in their acts."[19]

That alternative supposition may be called *dividuality*, and it is in some ways always already a component of Western personhood: on the one hand, although personhood is conceived in terms of a singular will expressively tied to the body, human time is nevertheless, as Locke conceded, divided between the discontinuous domains of waking and sleep, consciousness and dream; and will is limited in sexual experience, in illness, in the drive of the body toward ageing and death. On the other hand, the primary p. 279 locus of ↳ decision-making in advanced capitalist societies is in many ways not the individual but corporate entities—the state and its bureaucracies, corporations, planning and administrative systems, that take on person-like qualities and may have the legal status of a person. We could also think of the complex networks both of kinship, friendship, civic, and work relations and of relations between persons and things as weakening the strict boundedness of the individual subject.

In general, as Chris Fowler argues, "personhood is attained and maintained through relationships not only with other human beings but with things, places, animals and the spiritual features of the cosmos. Some of these may also emerge as persons through this engagement."[20] In the mode of dividuality "people are composed of social relations with others to the degree that they owe parts of themselves to others."[21] Fowler distinguishes between two central modes of dividuality which he calls *partibility* and *permeability*. The concept of partibility is most closely associated with Strathern's arguments about the relation between persons and things in the gift economies of Melanesia, where it is impossible to speak of an alienation of property since “persons simply do not have alienable items, that is, property, at their disposal; they can only dispose of items by enchaining themselves in relations with others.”[22] Gift exchange must thus be understood as a recursive process in which objects are circulated in order to create the relations in which they can circulate: this is a “personifying” mode of sociality “in which the objects of relations are always other relations.”[23] Conversely, there is both a division of interests among persons and an inherent divisibility of personal identity: “The partibility of the person (evinced in flows of wealth) is a counterpart to the person as a composite of the relations that compose him or her.”[24]

Whereas in partible relations both persons and things are divisible into metonymic states which then enter into relations of exchange and recomposition, in the mode of personhood that Fowler calls permeability the person’s mode of being is affected by the flow of the substances they ingest and exchange. In Hindu thinking about persons, social transactions are formed by exchanges of what McKim Marriott calls “substance-codes”: degrees of refinement of matter that carry codes of action and conduct and are correlated with rank within the caste system. The scale runs from relatively “gross” substances, such as cooked food or garbage, through more refined substances such as grain or land, still more refined substances such as money, and the most subtle (and most abstract) substances such as knowledge. Subtler substance-codes emerge

> through processes of maturation or (what is considered to be the same thing) cooking. Thus
> subtler essences may sometimes be ripened, extracted, or distilled out of grosser ones (as fruit
> p. 280 comes from plants, nectar from flowers, butter from milk); ↳ and grosser substance-codes may
> be generated or precipitated out of subtler ones (as plants come from seed, feces from food).[25]

All natural entities are composed of the substance-codes that pass through them and are modified by combinations and separations of these substance-codes; and “what goes on *between* actors are the same connected processes of mixing and separation that go on *within* actors.”[26] Human existence involves the constant transfer and absorption of particles of heterogeneous matter through relations of kinship or exchange, through the giving of alms and gifts, and through commerce, as well as through “subtler, but still substantial and powerful forms, such as perceived words, ideas, appearances, and so forth. Dividual persons, who must exchange in such ways, are therefore always composites of the substance-codes that they take in,”[27] and are constantly reconstituted through these processes. The caste system is built on the basis of transactions in substance-codes between superiors, inferiors, equals, and those without a place in the system.

We might think of these relations of individuality, partibility, or permeability between persons and between persons and things as the lateral dimension of social being, and it is complemented by a vertical, eschatological dimension in which persons are constituted by their relation to the generations of the dead from whom they inherit, to the gods, and to the unborn descendants to whom property and some of the components of kinship (a name, a status, a genetic inheritance) are to be passed on. These are virtual relations, which may yet possess a compelling concreteness.

All societies have at their heart the integration of the dead into the order of the living, typically through the remembrance of ancestors and through mortuary rites intended “to keep the soul of the dead person (or, rather, his image or phantasm) from remaining a threatening presence in the world of the living.”[28] Robert Hertz’s description of the widespread phenomenon of provisional burial, followed after a period by a set of final rites, draws attention to the marginal status of the soul between the two worlds, treated as an intruder if it ventures into the afterworld, and as an importunate guest among the living.[29] The period of mourning after death corresponds to this liminal state in which the soul belongs neither to the visible nor to the invisible community. Its passage from this world to the afterlife results in the formation of new communities, in which the dead either continue to mingle with the living or inhabit a quite separate space.

These beliefs and practices do not belong solely to traditional societies. Funerary rites and the veneration of the dead remain a component of the societies of modernity, and new eschatological relations have emerged p. 281 as the boundaries of the person have been ↳ problematized by technologies of the genetic or surgical transformation of the body, by its integration in a world populated by artificially intelligent entities and in new, virtual environments, and by its potential destruction as a consequence of nuclear war or catastrophic climate change. The embodied person is never a simple presence: its lineage stretches into the past and the future, and those relations with the dead and the unborn, whether conceived spiritually, genetically, or socially, shape its present being.

15.3 Boundaries: Non-Human Persons and Non-Persons

Personhood designates a bounded set of capacities, and it is defined in part by a set of exclusions: it is distinct from membership of other species, and from the world of inanimate things; it is distinct from the categories of the dead and the unborn. The legal apparatus of personhood works with a kind of violence to perform an act of simultaneous inclusion and exclusion by distinguishing full persons from semi-persons and non-persons (in Roman law, the *paterfamilias* from the sons, the female members of the family, and the slaves, as well as the freeborn from the emancipated; in contemporary Western law, the adult with full mental and physical capacities from children, the fetus, the terminally ill, the insane, etc.).[30] As a positive construct, the person is bounded by the human body. It bears rights and obligations, and is the subject of will and cognition, with liability for past acts and responsibility for promises or contracts entered into about the future. Yet none of these distinctions and capacities is absolute. Persons are, and are continuous with, animals. Their mode of relation to the world may be individual or dividual, permeable or partible; their identity may be limited to this world, may continue into an afterlife, or may pass by a process of metempsychosis into the identity of another person. Persons are never discontinuous with things since they project their will and capacities into technological things, and their sociality is, in many ways and increasingly, a "sociality with objects."[31] The social interaction of humans both with other humans and with machines can be understood as a mode of distributed intelligence, and the personal "self" as no more than "a small part of a much larger trial-and-error system which does the thinking, acting, and deciding."[32] Persons are joined in culturally various ways to the dead who gave them birth and who live in their memories, to the world of spirits or ancestors, and to the unborn to whom they bequeath their genes, p. 282 their name, and the world they leave behind; they occupy a transient space between ↳ nonbeing and death. The personal body may be incomplete, is subject to constant continuous and discontinuous change, and may be prosthetically extended. The present person may be radically different from the person who committed a past act: they may, for example, have undergone a religious or moral conversion, or they may suffer from severe amnesia or schizophrenia or dissociative identity disorder.[33] The one who promises knows that they may not fully speak for their future self. Rights and obligations are subject to the play of social power and the pressure of social forces. And to the extent that the person is a place defined by a social order, it is a different kind of thing in each society: a status granted by the gods, by totemic ancestors, by ancestral law embedded in country, or by a more or less secular system of law.

The category of the person is thus, as Peter Goodrich puts it, a very specialized and distinct rhetorical construct.[34] One way of understanding its construction is by looking at the limit cases and variant forms by which it is differentially defined. In what follows I look at *non-human* personhood; *qualified* personhood; *non-personhood*; *borderline* cases of personhood; *digital* personhood; and *quasi*-personhood.

In addition to "natural" persons, the concept of person is applied in modern legal systems to certain *non-human* entities—in particular, and subject to certain conditions of registration and jurisdiction, to corporations and to church and governmental associations. In his classic paper of 1938 Martin Wolff describes the development of doctrine on the nature of the corporate person, from an argument that "corporations, States, foundations are not persons, but they are treated as if they were" by a legal fiction[35] to its most recent form, the organism doctrine, according to which

> a legal person is a real personality in an extra-juridical, pre-juridical sense of the word. … This theory assumes that the subjects of rights need not be human beings, that every being which possesses a will and a life of its own may be the subject of rights and that States, corporations, foundations are beings just as alive and just as capable of having a will as are human beings. They are—so it says—social organisms just as humans are physical organisms. Their will ("common will") is different from the will of the members of the corporation or from the will of the founder. Their actions are their own, not carried out by agents or representatives like those of incapables (infants, lunatics), but in the same way as those of normal adults.[36]

Historically, the organicist conception of the corporation as an immortal autonomous entity with an interest separate from that of its corporators and a will expressed by its management and carried out by its agents coincided with the rise of corporate capitalism in p. 283 ↳ the late nineteenth century. By the 1920s, "the personified corporation had … completely absorbed the imagery which had suited the real person/real entity theorists only as an analogy,"[37] allowing it to capture rights which had hitherto been reserved to natural persons (in the United States, for example, certain, primarily financial rights and a limitation of liability not available to natural persons, as well as, subsequently, the right to freedom of political expression). Like full human citizens, corporations "may enter into contracts, buy and sell land, commit torts, sue and be sued. Other rights and liabilities are denied. Corporations cannot hold public office, vote in elections, or spend the night in jail"[38] (although I note that in some Australian local council electorates corporations do indeed have a vote).[39]

The other non-human entities to which personhood has at times been applied are objects and natural creatures. Temples and church buildings have at various times been regarded as the subject of legal rights, and "in admiralty, a ship itself becomes the subject of a proceeding in rem and can be found 'guilty.'"[40] More recently, there have been moves to allow personhood to trees, rivers, and other natural objects, particularly with a view to their protection.[41] Günther Teubner cites the case of the rats of Autun which in 1522 were formally tried (and acquitted) in an ecclesiastical court on a charge of having eaten and destroyed crops, and he mentions the prevalence of trials of animals in Western Europe from the ninth to the nineteenth centuries.[42] The personhood of animals is one of the most contentious areas of debate in contemporary law, as in contemporary moral philosophy; Tomasz Pietrzykowski notes that a "process of the legal dereification of animals has been slowly taking place since the late twentieth century and continues today."[43] Here the argument is that certain animals—higher mammals such as chimpanzees, or whales, or dolphins—possess or can be taught advanced communicative skills which are evidence of self-consciousness and rationality; on a Lockean view, they are at least as much persons as a mentally disabled human being. In Peter Singer's words: p. 284 ↳ "There could be a person who is not a member of our species. There could also be members of our species who are not persons."[44]

Some of those "members of our species who are not persons" are what I call *qualified* persons, and they include those who are excluded from full legal personhood by virtue of an incapacity of mental status, of gender, or of age. The insane have had a marginal status in both ancient and modern law, with the criterion of autonomous will—of "self-possession"—depriving them of the status of a fully entitled person, but the notion of mental incapacity may cover whatever defect of rationality renders a person in need of a guardian to act on their behalf: dementia, for example, but in a sense the immaturity of infants and the irrationality of women have been the reasons or the pretexts for qualifying the degree of personhood to which they are entitled and thus the legal rights they may exercise.

Most entities which are "not a member of our species"—most animals, almost all physical objects—are of course *non-persons*. The more interesting group of non-persons is those that are fully members of our species, in particular slaves. Roman slaves partake only of the personhood of their master, and are categorized as an *instrumentum* rather than a person (although the slave is differentiated from animals as a "speaking" rather than a "dumb" instrument). Orlando Patterson's account of the "civil death" undergone by American slaves on entering their condition (a "death" which involved separation from kin and renaming as an act of incorporation into the master's property) is a later example of this loss of personhood in the state of slavery.[45] Caleb Smith follows Saidiya Hartman in noting the "notorious double bind of slave law" which constitutes the enslaved "as property to strip away rights but as persons to hold them culpable for crimes"—a double bind that nevertheless "created openings that could be exploited for expression and resistance."[46] And Colin Dayan argues that, in the contemporary United States, criminals and detainees have the status of *negative personhood* that derives historically from slavery, entailing a similar form of rightlessness or civil death.[47]

Species being is thus no guarantee of personhood; and the boundaries of species being raise a number of *borderline* cases of personhood which problematize the givenness of the "natural" person. Birth and death are the clearest of these boundaries, but the moment of birth is, of course, not the beginning of individual human existence, and the legal status of the fetus is politically contested: the attribution of "fetal personhood" is a key strategy of conservative opponents of abortion, but in fact degrees of personhood are p. 285 applied at different stages of fetal development in all jurisdictions that recognize the ↳ mother's right to abort, in order to determine the limits of that right. At the other end of the spectrum, there are varying definitions of the end of life, and difficult ethical questions about the point at which a person in, for example, a permanently vegetative state should be recognized as no longer being appropriately described as a person. A different kind of borderline case arises with the emergence of technologies creating interspecies chimeras and hybrids, "combined from either genetic material (hybrids) or tissue (chimeras) that form a cross-species living organism," in particular where these hybrids would involve genetic code or tissue which is partially human in origin.[48]

Similar problems of definition and recognition arise in the case of *digital* entities which possess, or in the future may possess, a degree of autonomy and self-conscious rationality sufficient to qualify them as persons under a Lockean view of personhood. John Chipman Gray's authoritative definition of the person insisted on the criteria of intelligence and will,[49] and these criteria are the contestable stakes in assigning personhood to artificial intelligences (AIs). It is already the case that we enter into a multitude of quasi-contractual relations with digital entities: ATMs that deliver money to us, or programs that buy and sell shares on the stock exchange, or self-driving cars. Indeed, "what is possible now is a contract by interaction between electronic agents without the knowledge or action of an individual human being,"[50] and this supposes that these agents have a kind of autonomous intentionality.

Lawrence Solum explores these issues by way of two case studies. In the first, he examines expert systems that perform some of the functions of a trustee—by trading in stocks, for example, where decisions as to whether to buy or sell are made on the basis of a reading of market conditions. Such systems automate some of the tasks performed by human agents, exercising discretion and judgment under changing conditions. They have delegated agency that carries with it certain responsibilities, such as acting legally and in accordance with fiduciary duties. But it is not clear that such a program could be held accountable if it breached these duties in some way, and this question goes to the heart of whether it can be counted as a person, since our notion of what a person is "is inextricably linked to our experience of a human life"[51] and the moral responsibility that constitutes it—although of course these problems apply similarly to corporations, which are subject to criminal liability despite the fact that they are not natural or moral persons.

Solum's second case study builds on the first: supposing that an expert system can exercise some limited form of legal personhood, could it also—at least potentially, in some as yet unrealized future—lay claim to rights of constitutional personhood, such as freedom of speech or the right against involuntary servitude?

The objections to such a proposal are again built on various versions of the argument that artificial persons p. 286 cannot be understood by analogy with natural persons. But this argument has been ↳ undone in part by the fact that certain constitutional rights, such as (in the United States) First Amendment rights and the rights provided by the equal protection and due process clauses, have already been granted to corporations. The line between human and non-human persons is steadily blurring. Now, as Teubner puts it, the law is "opening itself for the entry of new juridical actors—animals and electronic agents"—by means of certain "highly formalized conceptual techniques—juridical personality, capacity for legal action, attribution of rights and duties, participation in administrative and judicial procedures"[52]—which allow it to grant very different kinds and degrees of rights and responsibilities. It is opening a world, in Solum's words,

> in which we interact frequently with AIs that possess many human qualities, but lack any semblance of human biology. Given this change in form of life, our concept of a person may change in a way that creates a cleavage between human and person. Our current linguistic practice will not be binding on the imagined future. In other words, one cannot, on conceptual grounds, rule out in advance the possibility that AIs should be given the rights of constitutional personhood.[53]

My final category of variant personhood is that of *quasi*-persons. Very briefly, what I envisage here is, on the one hand, cases in which real people assume the attributes of other people, and on the other hand cases of purely fictitious personhood. In the first class we might include legitimately delegated agency, but also identity theft and the impersonation of real or fictional persons on stage or screen. The second class, fictitious personhood, as it is manifested in the characters of novels or plays or movies or the avatars of digital games, seems to make a simpler distinction between real and unreal persons, but raises, as I've tried to show elsewhere, quite difficult ontological questions.[54]

15.4 Persons and Property

Legal personhood piggybacks on but is distinct from natural personhood, and historically precedes it. It defines the civic and legal status of persons, and thus the rights and obligations that they carry. At its core is the assumption of responsibility for acts committed and actions promised: it builds contractual relations between the members of a community in the absence of other kinds of ties. More generally, it builds a social contract which (depending on the jurisdiction) commits the state and its members to the observance of certain rights understood to be fundamental to human being: the right to life, the right to bodily integrity, the right to dignity, the right to freedom from hunger, the right to assemble and to express opinions freely, the right to a fair trial, the right to privacy, the right to own property, the right to alienate one's own labor, p. 287 and so on. ↳ Although these rights are generally taken to be grounded in natural law, they can more properly be taken to be historically emergent rights, with political underpinnings and a paradoxically "exclusionary architecture."[55]

In Western liberal thought in the Lockean tradition the primordial right that defines the integrity of the person is a property right[56]: "Every Man has a *Property* in his own *Person*. This no Body has any Right to but himself."[57] This self-possessing subject is both the foundation of all other property rights and the prototype of those things that *cannot* be alienated in the marketplace. If my body is property, "then objectively it is property for personhood"[58] and the ground of my freedom as a person, but if I am to be a free person then it is axiomatic that I do not have the right to sell myself into slavery, and my body is therefore not fungible property.

This aporia has implications for cultural and legal understandings of where the limits of the market are to be drawn. All societies define a domain of inalienable possessions, which includes personal attributes and the integrity of the body, sacred objects, and kinship relations; and the sorts of things that test its limits are, for example, the possibilities of creating a market in babies or in fetal gestational services, the sale of blood, of human organs, or of sexual services, or the payment of “amateur” athletes.[59] In recent years we have seen the development of an extension of the right to dispose of property in the self which in US law has taken the form of the *right of publicity* protecting the commercial rights that celebrities hold in aspects of their person. Unlike the right of privacy from which it grew, the right of publicity is formulated in such a way as to allow the exploitation of attributes of personality in the open market. The crucial difference is precisely that it is a property right, which means that ownership of the name, the image, or any other commercially exploitable attribute of identity can descend to heirs and can be assigned to others.

The concept of person implied by the right of publicity (based in self-possession and the alienability of representations of the self, but also in a sense in the merging of the self with its representations) is not a piece of ideology that can be demystified and then discarded. It is continuous with a millennia-long process of elaboration of the legal conception of the person, and it is intricately bound up with the workings of an entire mode of production. It corresponds in complicated ways to the imaginary forms of selfhood through which we experience the world and our relation to it. A historical effect rather than the ground of all history, formed at the intersection of the culturally specific distinction between the moral economy of the gift and the market economy of the commodity, the category of the person lacks any transcendental reality. Like the p. 288 concept of “rights,” it designates not a set of inherent attributes but a historical project ↳ and a site of intense social struggle. At the same time, however, this category is an evolving one, and its status is capable of substantial modification in the process by which new legal and political rights are formed. It builds the form of legal personhood deep into our sense of what it means to be a person, and it is one of the many ways in which the boundary between those aspects of our selves that are for sale and those that are not is being incrementally shifted.

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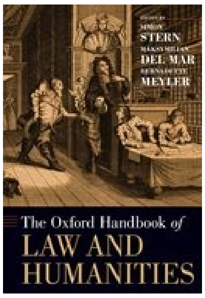

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CHAPTER

16 Trauma, Memory, and the Law

Norman W. Spaulding

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Abstract

For much of the twentieth century, the connections between trauma, memory, and law have traditionally been represented as redemptive. Naming traumatic experience by recovering the memory of victims, typically privileging their first-person testimony, has been critical to the work of seeing justice done. Across the disciplines of history, psychoanalysis, law, psychology, and critical theory, a vast literature seeks to connect the testimony of traumatic memory in a metaphysically immediate way to justice and truth. In many of these accounts memory work itself—remembering, testifying—*is* the work of justice, just as in psychoanalysis, recovering traumatic experience, reducing it to first-person narrative, *is* the cure. But the valence of the trauma/memory/law circuit is complex. Law is, after all, frequently a principal source of traumatic experience, operating repressively, causing revictimization, refusing to recognize the claims of the injured, and, more ominously, providing the state opportunities for biopolitical and emergency intervention. This chapter provides a brief history of the entanglement of trauma, memory, and the law, emphasizing its links to the development of the field of psychoanalysis and to deeply gendered, physicalist assumptions about harm. The chapter also synthesizes an emerging critical literature and suggests that criticism (methodological, political, conceptual, and normative) reflects fundamentally unresolved questions about the meaning of traumatic experience—questions that both reflect and obscure profound anxieties about the challenges traumatic experience poses to assumptions about the nature of modern life. If there is a practice of justice equal to the problem of traumatic experience, it has not yet been named.

Keywords: trauma, memory, law, traumatic memory, traumatic experience, psychoanalysis, mass atrocity, Sigmund Freud, restorative justice, queer theory

Subject: Jurisprudence and Philosophy of Law, Law and Society, Law

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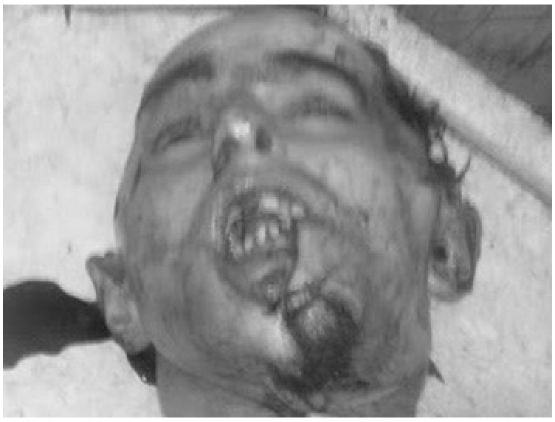
> “Necessarily, we must dismiss those tendencies that encourage the consoling play of recognitions.”[1]

TO begin with, the face and skull are pulverized. Broken teeth are exposed by the severed, dangling lower lip. The jaw is grotesquely distended. The zygomatic and sphenoid bones outside the left eye appear to have been fractured. The rest of the face is decentered, raked out of place—a ghastly cubist asymmetry drawn into lurid relief by the blood pooling on the surface behind the skull. The eyes are uncanny, open, staring upward, frozen in agony.

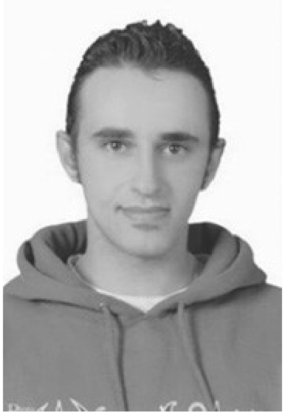
Figure 16.1



Screen capture from *We are all Khaled Said* webpage.

This photograph of Khaled Said (see Figure 16.1), posted online by Egyptian activists in June 2010, helped to spark a series of protests against police brutality and then the uprising in Tahrir Square that overturned the thirty-year military dictatorship of Hosni Mubarak. Among the most popular social media sites that galvanized protesters was Wael Ghonim’s “We are all Khaled Said” Facebook page. It juxtaposed the gruesome image with a pre-torture photograph of Khaled Said, then a handsome young middle-class businessman (see Figure 16.2).

Figure 16.2



Screen capture from *We are all Khaled Said* webpage.

Tens of thousands of people joined the page and both images of Khaled “spread like wildfire.”[2] On Ghonim’s suggestion thousands of followers “change[d] their profile pictures to an anonymously designed banner of Khaled Said, featuring him against the backdrop of the Egyptian flag, with the caption ‘Egypt’s martyr.’ ”[3]

Others took photographs of themselves holding a paper sign that said “We are all Khaled Said,” a practice
p. 290 that also went viral.[4] Both techniques grew out of Ghonim’s experience in online marketing ↳ (where cultivating personal consumer engagement with a product is crucial to closing a sale), not expertise as a political activist. But the logic of online marketing was tailor-made for the moment. And it worked. Expressions of “solidarity extended to expatriate Egyptians around the world and to Arabs in many countries. …”[5]

The two original photographs and their metastatic proliferation during the Arab Spring offer a poignant example of the circuitry that connects trauma, memory, and the law. On the one hand, the image of Khaled Said’s tortured body vividly represented his traumatic death at the hands of Egyptian police. It was “impossible to forget,” recalling as it did the disappearance and torture of countless other ordinary Egyptian citizens who had dared to defy the state (in some instances, by the simple act of seeking to cast a vote), and it crystallized sentiments underlying revolutionary resistance to the state’s brutality and seemingly perpetual invocation of “emergency laws.”[6] Ghonim and the protesters he and other activists worked to organize simply “could not stand by passively in the face of such grave injustice.”[7] Trauma. Memory. Law. Here in a plea for legal accountability that expanded into a revolutionary demand for a new legal order. The pre-torture image, for its part, reminded viewers of Said’s middle-class respectability, suggested his innocence, and, as importantly, compressed the interval between Said’s life as an ordinary Egyptian citizen and his death into the singular traumatic event of the police assault.[8] The juxtaposition thus functioned as a stinging indictment written in and through the body of the victim—a body that also functioned metonymically, calling forth the body politic from its torpor and vividly displaying its loss and its suffering.

p. 291 Not only was Said’s body transformed into a mnemonically charged legal plea, in his earliest posts to the “We are all Khaled Said” Facebook page Ghonim wrote in the first person, posing *as* Khaled Said and using colloquial Egyptian “closer to the hearts of young Egyptians … to overcome any barriers,” providing readers a ghostly, democratic testimony in the court of public opinion.[9] “ ‘Egyptians, my justice is in your hands,’ ” wrote Ghonim. “Speaking as Khaled gave me a liberty that I did not have. … It was as though Khaled Said was speaking from his grave. … ‘The prosecution issued a preliminary report that the cause of death was drug overdose. Not only have you murdered me, but you also want to stain my reputation? God will reveal the truth and repay your lack of conscience.’ ”[10]

As the prosecutor’s preliminary report indicates, the state was scarcely oblivious to the political implications of the trauma/memory/law circuit that online publicity surrounding Said’s death had activated. All the more so once Said’s mother gave an interview claiming that her son had been tortured and killed for exposing police corruption (he apparently possessed a video of police officers “examining and then allegedly dividing confiscated drugs and money”).[11] The state scrambled to respond on terms that would reframe public memory of the victim and the cause of death—not only claiming that Said died of an overdose, and that the deformities in the post-torture photograph were the result of an “autopsy,” but also posting false comments to activists’ social media pages attacking Khaled as an “addict,” “drug dealer,” and “Martyr of Marijuana,” and stating that he was wanted for four crimes including evasion of military service.[12] From this perspective, there was nothing to see in the post-torture photograph but the state dealing in a rational, technocratic manner with a low life who deserved his fate—the only crime and moral deficiencies were Said’s, not the state’s.[13] The Ministry of the Interior also took care to physically remind activists of the regime’s raw repressive power by stifling the first public protest in Alexandria sparked by the online campaign—“the security forces were prepared and decisive … arrest[ing] many protesters and surround[ing] the rest with double their number of police officers, nearly making a perfect circle. From afar—as later seen in a photograph—the image was quite symbolic. It perfectly represented what the regime was doing to our country. Worse yet, the media, under the usual pressure from State Security, ignored the protest.”[14]

What the regime did not anticipate, and did not then have the means to control, was the forum social media gave to the Said family to respond, outside state-controlled news organizations, to attacks on the memory of their son, or the platform it provided to eyewitnesses to the torture and murder who came forward to record videos that went viral online. Their testimony described "the viciousness of the violence" as officers repeatedly "beat Khaled's head against the stairs" of a building near the Internet café from which they had dragged him.[15] Had the Mubarak regime been even a little more tech savvy, its disinformation campaign even modestly more imaginative and thorough, the circuit might have been reversed—Said's family and the
p. 292 eyewitnesses might have ↳ been rounded up, bribed, discredited, or otherwise promptly neutralized so that the state-sponsored revision of the memory of Said's death could have saturated public consciousness and prevailed. To identify a circuit connecting trauma, memory, and the law is not to say that it serves the interests of justice in any necessary way. Moreover, the circuit is fragile, adaptive, plural, even reversible.

And of course we know what followed: the euphoria of a largely non-violent revolution, constitutional reform, the rise of the Muslim Brotherhood, retrenchment, a military coup by Abdel Fattah el-Sisi, and the return of the very kind of repression that sparked the revolution in the first place. Repression "at least as relentless—some say worse—than the bad old days of President Hosni Mubarak."[16] In December 2015 the Egyptian Commission for Rights and Freedoms "published a … shocking report on enforced disappearances. After talking to victims, families and lawyers, it documented 340 cases in a three-month period between August and November … with an average of three per day. Victims who were later released described undergoing various types of torture including electric shock, hanging by the hands, and threats of sexual assault."[17]

Traumatic memory operates on both sides of this new repression, supporting radically different conceptions of the rule of law. Activists continue to invoke the image of Said, now to indict Sisi's regime as an illegitimate heir, indeed a subversion, of the revolution.[18] And the Sisi regime, for its part, constantly reminds Egyptian citizens that its repressive emergency measures are necessary to "find and arrest terrorists who threaten the security of the state."[19] These "security threats" include not only radicalized Islamists but the now banned Muslim Brotherhood—the memory of whose rise to power marks the failure of secular reformists' ambitions for the 2011 Tahrir Square protests—and " 'all actors and political forces who directly challenge the regime and its interests,' " even " 'those young, secular revolutionaries … once [seen] … as the future of a new Egypt.' "[20] The revolution itself has, in this way, been refigured as a national trauma the return of which it is the duty of officers of the law to prevent.

To examine the structure of a trauma/memory/law circuit is thus to enter what Michel Foucault called a "hazardous play of dominations," a play that "establishes marks of its power and engraves memories on things and even within bodies. It makes itself accountable for debts and gives rise to the universe of rules, which is by no means designed to temper violence, but rather to satisfy it."[21] Drawing a contemporary example from the upheavals of revolutionary time highlights this play of dominations in a relatively contained time horizon, but it can be identified in all trauma/memory/law circuits. Consider the formal psychiatric recognition of posttraumatic stress disorder (PTSD) in the *Diagnostic and Statistical Manual of*
p. 293 *Psychological Disorders* ↳ (DSM-III)[22]—a step which extended the legal salience of PTSD in the regulation of veterans' disability benefits and the prosecution of sexual assault. As crucial as this step has been in the evaluation and treatment of trauma and in the effort to disaggregate traumatic experience from the century-long limiting effects of the "physical injury rule," it also helped convert perpetrators of war crimes in Vietnam into victims. As one commentator summarizes:

> the definition of a traumatizing experience in the DSM-III was phrased in such a comprehensive manner that it even included the experience of having committed war crimes or other severe human rights violations, such as torture or the killing of victims. Thus … the category of PTSD made room for a new type of "self-traumatized perpetrator," that is, for soldiers who were

> traumatized by their own extraordinary acts of violence, in the aftermath of which they suffered a moral and psychological conflict. … Although, in principle, there is no reason why acknowledging that committing severe, violent crimes may have detrimental psychological effects on the perpetrators should eclipse the suffering of the actual victim, in practice, it seems, the politics of trauma and victimhood is competitive. Whereas there is an extensive literature documenting the chronic PTSD of American Vietnam war veterans, there has been no concern at all with the traumatization of the Vietnamese – with the exception of those who have come to live in the West.[23]

This is of course not the conventional mode of analysis. For much of the twentieth century, at least since World War II, the Holocaust, and the Nuremberg trials, the trauma/memory/law circuit has traditionally been represented as redemptive, not repressive or exculpatory with respect to perpetrators. Naming traumatic experience by recovering the memory of victims, typically privileging their first-person testimony, is seen as a basic integument of the work of seeing justice done.[24] For example, the circuit lies at the core, conceptually, methodologically, and normatively, of human rights law and its redemptive aspirations. As Winter and Prost have shown in their fascinating biography of René Cassin, these commitments are not accidental. Cassin, a principal drafter of the 1948 Universal Declaration of Human Rights, a "major champion and central figure of the Human Rights Commission of the United Nations" and distinguished judge on the European Court of Human Rights, was himself a World War I veteran, grievously wounded in the abdomen, arm, and chest by machine gun fire on the Western Front in the fall of 1914.[25]

p. 294 The injuries were grave, "the bullet which had ruptured his abdomen had broken his hip bone, leaving numerous fragments and destroying the abdominal wall."[26] Despite his injury "he dragged himself to within shouting distance of his captain and urged him to retreat, thereby saving the company from encirclement."[27] As night fell he had to bang his drinking cup on a stone to draw the attention of stretcher-bearers.[28] It took two operations, the first conducted without anesthesia, "to remove the casing of the explosive bullet which had been lodged in his hip."[29] The surgeries saved his life but left him permanently disabled. On returning to the practice of law Cassin became part of an influential generation of advocates for wounded veterans and for international institutions to support disarmament and peaceful dispute resolution. Winters and Prost contend that Cassin's traumatic experience in World War I profoundly shaped his work on the Universal Declaration of Human Rights, an essential component of "the construction of an international legal order based on human rights" in the wake of World War II and the Holocaust (to which Cassin, a Jew, lost twenty-five relatives, all deported from France to be killed by Nazis, his sister to Auschwitz in 1944).[30] Human rights law narrates trauma, on this account, because its provenance is traumatic memory. In and through this forensically structured narration it seeks to privilege the local experience, memory, and rights of the individual over and above those of sovereign states—indeed, to displace sovereignty from the state to its subjects.[31]

Across the disciplines of history, psychoanalysis, law, psychology, and critical theory there is a voluminous body of work seeking to connect testimony of traumatic memory in a metaphysically immediate way to justice and truth.[32] Even otherwise scrupulously conceived and executed critical treatments slip into metaphysics. Cathy Caruth's pathbreaking work on traumatic memory repeatedly suggests that the voice of traumatic injury contains or "witnesses a truth."[33] She is acutely aware that traumatic injury offers only "enigmatic testimony" that "resists simple comprehension."[34] But the temptation to associate what we struggle to apprehend in trauma as a (hidden, and yet insistently resurfacing) "truth" is apparently irresistible. Shoshana Felman's revealing close reading of the film *Shoah* both insists on the "impossibility of testimony" regarding the Holocaust and "the inaugural event of finding … testimony … its singular significance and functioning of the story of an *irreplaceable historical performance*, a narrative performance which no statement (no report and no description) can replace and whose unique enactment by the living witness is itself part of a *process of realization* of historical truth."[35]

p. 295 In other accounts memory work itself—remembering, testifying—*is* the work of justice, just as in psychoanalysis, recovering the traumatic experience, reducing it to first-person narrative, *is* the cure.[36] The paradigmatic legal example of memory work of this kind is the truth and reconciliation commission, concentrating as it does on the restorative justice that inheres in testimony *simpliciter* rather than criminal prosecution, lustration, civil compensation, or other monetary reparations.[37] And yet here too, as in the DSM-III definition, the circuit's valence is complex. Perpetrators receive immunity from prosecution in exchange for their testimony, and their testimony frequently devolves into an account of their own trauma, their status as victims.[38]

So too, in conventional accounts, law is typically regarded as the product of confrontation with traumatic memory, indeed a formal recognition and redemption of that memory, rather than as a social force that shapes memory and indeed shapes the experience of trauma.[39] The perverse fact that the process of seeking a legal remedy can become a repetition of the original trauma is well known, particularly in the area of sexual assault where the legal process can be so traumatizing as to inhibit many victims from reporting assaults in the first place.[40] Less commonly examined are the contradictions that nearly exclusive focus on criminal punishment feeds a carceral system in which sexual assault is pervasive, or the implications of the valorization and proliferation of victim impact statements far beyond the setting of sexual assault.[41] More broadly, as the physical injury rule demonstrates, law often determines what counts as cognizable trauma—not only distinguishing suffering for which another is accountable from *damnum absque injuria* but subtly influencing social understandings of suffering itself. In the nineteenth century, when trauma first began to lose its more or less exclusive reference to physical injury, when it began to be associated with psychic harm and memory, the physical injury rule reinforced deeply ideological and gendered understandings of the condition. The best studied example is railroad accident victims who walked away from accidents seemingly uninjured but suffered from nervous disorders after the fact. Victims of trauma, particularly those who p. 296 could show no immediate connection to ↳ physical injury, no "red badge of courage," were routinely characterized as shamefully "effeminate," insufficiently rugged, "malingering," and generally unsuited to the conditions of modern life.[42] And of course the defense to liability permitted the social and economic activity responsible for the traumas to continue. If the DSM-III finally upset this legally endorsed marginalization of some trauma victims, its social, political, and economic effects linger.[43] Indeed, an emerging literature in psychology on resilience and hedonic adaptation can be read as endorsing the same view—that the problem with people who do not recover from the traumas of modern life is not the structure of modern life or the source of traumatic injury but the victims' lack of resilience.[44]

Plainly the conventional account fails to capture important complexities of the trauma/memory/law circuit. This perhaps explains the emergence, particularly over the last two decades, of a literature that is increasingly skeptical of trauma and memory even as the circuit remains a predominant method of mobilization in contemporary social movements, and trauma and memory remain predominant modes of sociolegal research and analysis in an increasingly wide array of disciplines.[45] In what follows, I first provide a brief sketch of the history of the intersection of trauma, memory, and the law. Second, I synthesize the critical literature and suggest that it reflects fundamentally unresolved questions about the meaning of traumatic memory—questions that both reflect and obscure profound anxieties about the challenges traumatic experience poses to assumptions about the nature of modern life. Finally, I return to the legal complexities of traumatic memory and the specific difficulties the law confronts in attempting to assimilate it into the work of seeing justice done. If there is a practice of justice equal to traumatic experience, it has not yet been named.

16.1 History

> "the chief emphasis lay upon the patient's resistances …"[46]

The DSM-III defined trauma as the experience of an extreme event (death, serious injury, or mutilation) p. 297 causing intense fear, helplessness, or horror, which recurs persistently in ↳ memory and causes a range of associated behavior and affects (e.g., avoiding triggering stimuli, numbness, and increased psychic arousal).[47] A key feature of trauma, then, is that it resurfaces in memory, that it occurs and recurs "as a break in the mind's experience of time."[48] Indeed, trauma and memory have been tightly linked from the beginning of the nineteenth-century transition in usage of the word "trauma" from a term for more or less exclusively physical injuries to a term describing complex psychological conditions.[49] As early as 1893 Freud insists that "the memory of the trauma … acts like a foreign body which long after its entry must continue to be regarded as an agent that is still at work."[50] The hysteric, he continued, "suffers mainly from reminiscences" which reproduce fractured elements of a past traumatic experience.[51] And of course in his early work Freud was confident that the symptoms of neurosis could be cured by identifying the repressed traumatic event—deepening memory work in order to consciously recover and process the event.[52] In some accounts, Freud's theory of trauma is even more closely connected to the temporal dimensions of consciousness. It's not just that the victim suffers reminiscences of a psychically overwhelming event. The source of psychic trauma is not the overwhelming external event in and of itself but rather the absence of anticipatory anxiety, an absence, therefore, of a protective psychic barrier when the event takes place.[53] The intrusions of PTSD, according to this view, represent the mind's effort, often well after the fact, to master by repetition this initial vulnerability—reproducing, over and over, the conditions that should have prompted protective anxiety.

Roger Luckhurst reminds us that even before Freud's investigations and the intervention of other psychologists, the problem of trauma as a psychological phenomenon was deeply rooted in the shocks of p. 298 modern industrial life. "[T]he railway accident was the ↳ site of the 'first attempt to explain industrial traumata' as it exposed the traveling middle and upper classes to the kinds of technological violence previously restricted to factories. The speed of collisions often rendered these accidents particularly gruesome events. Yet even those who survived without apparent physical injury began to report strange effects on their nerves."[54] Their claims were gradually supported by increasingly refined statistical analysis of data which revealed the breadth of ostensibly idiosyncratic symptoms. Statistics thus helped to establish a record of "the puzzling and damaging consequences of modernity, not just of poverty, inequality, and disease, but records of industrial and technological accidents"—the "risky environments typical of modernity" that were supposedly controlled by "rational management."[55]

So-called "railway spine" purported to describe, in a still-physicalist metaphorical register, these mysteriously persistent symptoms arising from train wrecks. Early medical case studies described "disordered memory, disturbed sleep and frightful dreams, and various types of paralysis, melancholia and impotence … physical and mental effects [that] seemed to ramify and worsen over time."[56] Similar symptoms surfaced in tort claims brought by mere bystanders who saw the accidents and riders who suffered no observable physical injuries.[57] Indeed, the struggle to overcome the physical injury rule and to measure and properly compensate emotional distress in tort law is apparently one of the earliest points of contact between trauma and the law, revealing a still lingering "irresolution," as Luckhurst puts it, "of legal discourse around nervous shock."[58]

The debate about " 'railway spine' " thus "names a conjuncture of body and machine, the violent collision of technological modernity and human agency. This inaugural version of trauma is also intrinsically … a medico-legal problem, which is to say it is defined in and through the institutions and discourses marking the rise of the professional society in the nineteenth century."[59] This conjunction of professional authority and distinctly modern injuries calling for recognition ensured that "[r]ival experts would henceforth seek to define the protean signs of trauma in their specific disciplinary languages."[60] Railroad corporations and their lawyers retained medical experts to defend the physical injury rule and plaintiffs sought their own to prove that psychic injury was real even if not connected to an observable physical injury.[61] Moreover, intense legal and academic competition among experts has of course ensured that “the very act of definition contribute[s] to the mobility of symptoms” and therefore, to this day, to debate about the coherence of the concept of trauma and who count as legitimate victims.[62]

In the early twentieth century, however, it was Freud and therefore the discipline of psychology that captured popular imagination and “massively extended the potential range of the term trauma,” particularly after he identified traumatic war neurosis symptoms in “shell shocked” World War I veterans—symptoms strikingly similar to those he had earlier found in hysterics.[63] Here, as in railroad accidents, p. 299 modern technology ↳ and mass society not only generated grave, new injuries (trench warfare created a “mechanized field of death” on a previously unimaginable scale), the same physicalist-psychodynamic debate resurfaced in claims for veterans’ disability benefits: “shell shock was named for a violent, exterior, physical cause yet also appeared to be an interior, psychical condition which was often completely detached from any causal connection to artillery bombardments.”[64] And questions persisted about the independence of the professional expertise in and through which the condition was diagnosed and treated: “To recognize shell shock was to sanction what one lieutenant-colonel termed ‘a very contagious source of trouble when it gets into a battalion.’ ”[65] For precisely this reason, “[m]any of those treating shell shock discovered that military psychiatry was an impossible profession, caught between contradictory imperatives of cure and fitness for return to service.”[66] Even after the Great War, veterans struggled for recognition of shell shock as a compensable disability.[67] This was true despite the fact that shell shock came to “embody the traumatic experience of the Great War in collective memory,” deeply influenced “aesthetic Modernism,” and “ ‘notions of trauma, temporal dislocation, and anamnesis (loss of memory)’ ” shaped “Western consciousness.”[68]

Luckhurst’s account concentrates on two other seminal twentieth-century events that “ensured … wide diffusion of the trauma paradigm” with the moral and legal “elevation” of survivor testimony after the Holocaust.[69] The first is the “all-pervasive psychological scar of camp experience.”[70] A massive body of scholarship explores the imperatives surrounding representations of this acutely traumatic experience and its influence on postwar literature, theory, and culture. The second event is the formal recognition of PTSD in the DSM-III in 1980. Vietnam veterans, second-wave feminists seeking recognition of battered women’s syndrome, and psychologists responsible for their treatment joined forces to advocate for the inclusion of PTSD in the DSM-III. Human rights activists have since made it a global portmanteau for the experience of mass atrocities.[71] Luckhurst sees the recognition of trauma in the DSM as particularly pivotal, concluding that the “arrival of PTSD helped consolidate a trauma paradigm that has come to pervade the understanding of subjectivity and experience in the advanced industrial world.”[72]

Just as quickly as trauma achieves formal medical recognition, however, controversies not altogether unlike the accusation of “*maladies simulées*” and “pension neurosis” in nineteenth-century accident victims and hysterics resurface.[73] One of the most prominent and vexing examples is the extended, vituperative debate in the 1980s and 1990s over so-called recovered memories of childhood sexual abuse and accusations that therapists have not only induced clients to “recall” completely false memories—abuse that never took place—but taken the stand to testify as experts in defense of recovered memory.[74]

p. 300 Luckhurst’s attention to the influence of the DSM-III is undoubtedly warranted, but it has the disadvantage of privileging, both conceptually and methodologically, the very competition among experts and legal contestation that he reveals as a structural problem in understanding the emergence of trauma in the nineteenth century. The history of that competition is very real, its influence on the concept of trauma powerful. But it may give undue weight to the battle of experts and at the same time subtly reinforce the normative view that professionally contested aspects of social experience—particularly aspects that appear rather decisively to elude professional consensus—are suspect.

What remains missing is a broad, synthetic sociolegal study of the development of the trauma/memory/law circuit in the nineteenth and twentieth centuries giving due weight to its deep cultural and aesthetic salience.[75] Studies of memory, particularly those which concentrate on the practices, ideologies, and genealogies of individual and collective commemoration, are a very important first step insofar as they join social history, aesthetics, performance studies, and rhetorical analysis.[76] But a comprehensive account would also have to take up literary critical studies of transformations in the meaning of tragedy. Trauma can be interpreted as marking the disruption of premodern structures of social meaning according to which evil and suffering were experienced and assimilated (through grief, retribution, heroism, and self-blame) within the painful but psychically reassuring register of tragedy. As Søren Kierkegaard observed in *Either/Or*, modern suffering "has no epic foreground, no epic remainder. The hero stands and falls entirely on his own deeds. … and when the age loses the tragic, it gains despair. In the tragic there is implicit a sadness and a healing … the sorrow more profound, the pain less."[77] Traumatic experience reflects this loss of epic foreground and remainder, just as it expresses the severed connection between grief and healing.

Profound loss and cruelty are scarcely new phenomena. What seems distinctive about the development of trauma is not only its close association with modern technological and industrial life but its "resistance to conceptual assimilation" in the memory of the victim as tragic experience, and of course, as we have seen, its resistance to redemptive appropriations, in both law and culture.[78] A full history would take up these forms of resistance, not least of which because they figure prominently in critiques of the concept of traumatic memory.

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16.2 Critical Assessments

> "This, then, was the complete game—disappearance and return."[79]

First, at the definitional level, there is a persistent oscillation in the characterization of trauma. On the one hand, psychic trauma is regularly characterized as an overwhelming or shattering event—an event which, as Galanter-Levy describes, "puts the ego out of action,"[80] or, as another commentator describes, an event that causes "a collapse of the autonomous, conscious self-control of the individual, a rupture in the sense of time."[81] On the other hand, trauma is frequently characterized as a universal attribute of psychosexual development fundamental to modern identity formation and the concept of the divided subject.[82] According to this view, also derived from Freud, the modern subject is formed by the traumas of separation from the mother, the prohibitions of the father, Oedipal conflict, and the terrifying recognition of death.[83] This is not the only example of universalization: human rights advocates have been criticized for exporting a fundamentally western conception of trauma to the experiences of oppression and suffering in other cultures, and postcolonial theorists have written about the imperialist implications of certain forms of posttraumatic memory in the perpetrators of colonial violence.[84] And of course as the concept has penetrated popular consciousness the term is often deployed as a thoroughly banal, not necessarily ironic, adjectival commentary on the quotidian frustrations and disappointments of everyday life.[85]

Second, at the level of phenomenology and epistemology there is a fundamental dispute over whether trauma is in fact a real, indelible event in psychic life, or, on the other hand, a delayed, "recovered," and p. 302 therefore contingent after-effect of memory,[86] a ↳ reflection of purportedly inferior, "weak-willed," "malingering," insufficiently masculine moral and psychic constitution,[87] or worse still, a figment of imagination, suggestion, or pure fabrication.[88] The latter claims are reinforced by well-documented instances of nakedly fraudulent appropriations of trauma narratives. Among the most outrageous is the mid-century novelist and anti-Semite Louis-Ferdinand Céline, who "proudly asserted" that he was a victim of shell shock after World War I, offering as proof a photograph with his head wrapped in bandages (taken when he was in fact suffering from a toothache).[89] In 1932 he published a celebrated war novel falsely claiming that a principal character’s war trauma was based on his own.[90] These disputes about the phenomenology and verifiability of “psychic trauma,” present as we have seen from the beginning of the modern use of the term, have only deepened as cognitive psychologists and neuroscientists have exposed the remarkable “plasticity” of memory.[91]

Third, and relatedly, trauma figures both as a legitimate, necessary object of dispassionate, academic inquiry, on the one hand, and an experience figured as fundamentally unknowable, or at least unmeasurable, either because (a) it cannot ethically be reproduced in lab conditions,[92] (b) it produces so overwhelming a form of “atavistic anguish,” as Primo Levi once put it, as to be beyond representation,[93] or (c) it is so overwhelming as to swallow not only the victim but her post hoc analysands. Psychologists, historians, lawyers, judges, and bureaucrats are all, according to the latter view, constantly at peril of losing or surrendering their prized neutrality in approaching the trauma victim and her searing memories.[94] The problem is captured poignantly in the French Holocaust historian Henry Rouso’s refusal to testify in a Nazi p. 303 war crimes case on ↳ the ground that the “judicialization of history” confuses memory with history and does violence to the nuances and subtleties of true historical research.[95]

Fourth, at the temporal level, traumatic memory is generally understood to exist outside time—ordinary consciousness and memory are ruptured and the trauma victim experiences fragmentary elements of the underlying event more or less immediately. The PTSD victim is literally swept out of the present.[96] On the other hand, at least since Freud’s early work, it has been assumed that traumatic memory can be reduced to temporal sequence, pinned by narrative in time, and thereby tamed. This temporal instability is paralleled at the level of symptoms by the fact that some traumatic memories are indeed intrusive while others are completely repressed in the form of amnesia; and the victim may oscillate between states of utter numbness and extremely high affect.[97]

Finally, at the clinical level of allopathic treatment, even Freud equivocated toward the end of his career, most notably in *Beyond the Pleasure Principle*, on the question whether traumatic neurosis is actually curable—whether there are not certain irreducible barriers to recovery, among them perhaps most notably the death wish.[98] Both clinical treatment and, as I have elsewhere written, the work of seeing justice done are motivated by a desire for cure and closure which trauma not only triggers and feeds but resists.[99]

These tensions account in no small measure for the combination of “urgency and bewilderment of clinicians” in the face of traumatic memory.[100] We can also perhaps appreciate the emergence of accusations of “semantic contagion” in the use of the word trauma,[101] the “polemics” and the profound “academic struggles and … conflict of ideologies of knowledge” even among those for whom traumatic memory is an organizing intellectual construct,[102] and the alleged “abuses of the trauma concept” as it approaches cultural saturation and becomes nested “at the root of many national collective memories.”[103] Indeed, the more sustained, intense, overwhelming, and widespread the specific trauma one examines, the more acute these tensions appear to be. Taking the tensions together, one is inclined to conclude that demand for and resistance to assimilation is a structural feature of traumatic memory, not merely an artefact of the interdisciplinary nature of the concepts of trauma and memory, nor the long p. 304 interprofessional competition for mastery of the phenomenon, its various markets, and its attendant ↳ power-knowledge matrices. Trauma demands recognition and at the same time defies positivistic assessment. It is oscillating, queer, uncanny, polymorphous, and polysemic.

16.3 Law

> “[T]here really does exist in the mind a compulsion to repeat which overrides the pleasure principle.”[104]

Demand for and resistance to assimilation of traumatic memory is particularly evident in the law. To begin with, trauma operates both as exception and rule. Law regularly takes up traumatic experience in criminal trials, in cases involving constitutional and dignitary torts, in claims for emotional distress, in human rights litigation, in claims for reparations, and in the immunity doctrines that make alternatives to litigation such as truth and reconciliation commissions possible. There are of course many ordinary civil and criminal cases that do not involve traumatic injury, but Shoshana Felman only just overstates the case in contending that “trauma … is the basic underlying reality of the law.”[105] And where trauma is involved, law is often expected to complete the circuit.

And yet we know that the law quite regularly, and sometimes quite spectacularly, fails to assimilate trauma. There is, as we have seen, the well-documented difficulty of English and American courts in moving beyond the physical injury rule, the resistance of courts and bureaucrats to “shell-shock” claims on behalf of war veterans, and the fact that adjudication often reproduces for survivors the very trauma it purports to remedy. More fundamentally, Felman asserts that where traumatic memory is concerned “what has to be heard in court is precisely what cannot be articulated in legal language.”[106] Law, she contends, seeks but ultimately fails to “contain,” let alone “master,” trauma.[107] She points to a pivotal moment in the trial of Adolf Eichmann when Auschwitz survivor and author Yehiel De-Nur loses consciousness at the beginning of his testimony as an example of law stumbling before the “abyss” of trauma: “a dimension (of reality, of desire, of disaster) that the law has to confront but is structurally bound to miss.”[108]

Other examples could be elaborated, including the problem of retroactive prosecution for crimes that did not exist at the time they were committed,[109] the constraints imposed by statutes of limitation on the temporal fluidity of traumatic memory, trying perpetrators in the victor’s or victim’s courts,[110] gaps
p. 305 between the complexity of historians’ ↳ archival evidence of mass atrocities, the fluidity of victims’ memories, and ordinary rules of evidence,[111] the free speech paradoxes of Holocaust denial laws,[112] the loss of collective and structural accountability in methodologically individualistic procedures of traditional criminal and civil adversary litigation,[113] the loss of individual voice in collective procedures, the false closure provided by doctrines of repose such as res judicata and double jeopardy, and of course the utter inadequacy of monetary relief and criminal punishment when compared to the depth of suffering associated with traumatic injuries.[114] If the law is to assimilate traumatic memory, it apparently cannot remain within ordinary liberal democratic boundaries for the administration of justice. And yet to transgress those boundaries, to generate exceptions, is both to risk the law’s legitimacy and to subvert the project of assimilation.

In the context of the debate about reparations for slavery and appropriation of the lands of indigenous people, for instance, hand-wringing about these risks ended a series of late twentieth-century and early twenty-first-century legal claims. The most intriguing aspect of this was not the strident formal affirmations of ordinary legal boundaries in American courts but the vigor with which left-leaning legal and political theorists rose to defend these boundaries. The two core principles they invoked were (a) prescription: the idea that rights which might otherwise give rise to remedies can be superseded by the mere passage of time and should be superseded where present expectations and economic arrangements have settled around changed circumstances—the rights of putatively innocent current property holders trump the rights of victims and their descendants[115]; and (b) counterfactual comparison: which holds that where current members of victimized groups owe their very existence to those who survived the direct traumas of slavery and expropriation, there can be no recovery because existence is a benefit that offsets any associated losses—victims simply cannot show that they would have been better off if the injuries had not occurred.[116]

Both principles have been subjected to withering academic criticism.[117] But they resonate with and reinforce
p. 306 a stable consensus of public and judicial opinion that has ↳ defeated claims for reparations.[118] The trauma/memory/law circuit, in this context, has not only short-circuited, a regnant conception of law underwrites cognitive dissonance and collective amnesia. Most Americans tremble at the thought of any

true reckoning with the “abyss” of the legacies of slavery, segregation, Native American genocide and land theft, and, underneath it all, the persistence of white supremacy.[119] Indeed, against the failure of the reparations movement, the more recent controversies regarding confederate monuments, buildings named after slaveholders, and racist mascots read as displacements. The revisionist movement treats memory work itself as a means of seeing justice done, and with good reason, but one wonders if it has not become more post-script than preface to a genuine reckoning with traumatic memory.[120]

The legal/symbolic dichotomy is of course false. The Nuremberg trials were designed to reverberate as an affirmation of specific ideas about the rule of law well beyond the individual counts in each indictment. All public criminal trials are in fact exemplary. And monuments provide more than cultural documentation of heroism, sacrifice, and loss. They assign historical guilt and innocence, and they embody collective aspirations and commitments regarding the social order (political, economic, moral, and quite often constitutional).[121] Confederate statues do not belong in public squares on any reasonable understanding of the history of American white supremacy, and yet simply removing them can invite the very cognitive dissonance and self-serving amnesia regarding the odious history their unmediated presence sustained.[122]

p. 307 As importantly, the academic criticism and the debates surrounding monuments, building names, and mascots miss the most galling contradiction regarding remedies for mass historical injustices: the more grave, enduring, and seemingly irreparable the injury flowing from an injustice, the longer the claims of traumatic memory have been repressed, the more urgently needed and yet apparently less capable are the law’s ordinary powers of assimilation.

In both redemptive and prescriptive accounts, the emphasis is generally on the availability and adequacy/necessity of law as an ex post remedial tool. Law arrives after trauma and therefore generally appears in varying degrees of verisimilitude as the rational, deliberative, dispassionate, skeptical, and crucially, for present purposes, innocent and interrogative complement to the survivor’s or survivor community’s traumatic memory.[123] But emphasis on this version of the circuit has sometimes distracted legal observers from the intriguing and profoundly important respects in which law is present ex ante and in media res—respects in which there is no trauma without law. To begin with, at the individual psychoanalytic level, “law” is present at the primal scene in the form of the father’s prohibition—the very prohibition that sparks the engine of repression that drives repetition compulsion. Whether or not this is a necessarily traumatic experience and a universal condition of psychic life, the desire for law activated in the trauma/memory/law circuit may be linked to the initial prohibitions, particularly the libidinal charge with which the authority of prohibition is thereafter invested.[124]

Postcolonial theorists have also revealed the instrumental role that secular, Western legal ideals and ostensibly “universal” rights played in the work of colonization—the way Western law functioned as “a technology of colonial rule … and of particular forms of violence.”[125] Samera Esmeir describes the displacement of the traditional khedival legal order in Egypt by the concept of a “juridical human” according to which “the colonial state attempted to juridically humanize the colonized, and in so doing … it also revealed how humanity came to be thought of as something that could be confiscated or allocated,” either excluding or “binding the living to the state.”[126] Crucially, this established the terms for withdrawing the subject’s legal entitlement to the protection of the state and unleashing the full power of colonial violence. At the level of theory, Esmeir provocatively links and juxtaposes these claims about law as a technology of subordination to Hannah Arendt’s assertion that “the first step toward total domination” in
p. 308 the rise ↳ of totalitarianism and associated mass atrocities in mid-twentieth-century Europe “consisted in the ‘murder of the juridical person.’ ”[127] Destroying the juridical personhood of the victim is of course a political, cultural, and *legal* process.[128]

Law is not only an integument of traumatic experience, it also plays an important role in regulating the boundaries of anticipatory trauma.[129] We know that in the name of community policing and preventive "order maintenance" specific minority groups have frequently been targeted for spectacles of excessive state violence. Consider *Lyons v. City of Los Angeles*,[130] a case brought by an African American man subjected to a chokehold during a routine traffic stop that rendered him unconscious. Lyons requested an injunction ordering the police department not to use the chokehold. He offered evidence that the chokehold was used without regard to the degree of threat posed to an officer (a violation of the Fourth Amendment) and that that a majority of the deaths caused by the technique were suffered by African Americans (a potential violation of the Fourteenth Amendment). The crux of the case was thus anticipatory trauma—the reasonableness of Lyon's fear of revictimization as against the reasonableness of officer's fear of black bodies.

The Supreme Court disregarded the evidence of racial bias and held that Lyons had no standing to seek injunctive relief because he had no reasonable fear, based on his past traumatic experience, that he personally would be pulled over again and subjected to a chokehold. If he feared being pulled over again, he need only drive safely, the Court reasoned, and if he feared excessive force, he need only comply with an officer's orders. So while his suit for monetary relief to recover for the past chokehold could proceed, the lower courts were powerless to prevent the police from continuing to rely on the chokehold policy. The chilling effects of the anticipatory trauma with which African Americans live were thus rendered essentially non-justiciable in *Lyons*. The case was decided in 1983, a decade before the Rodney King beating, before the ensuing criminal prosecutions of the officers revealed that police brutality of the kind Lyons suffered was a disturbingly common experience for African American residents of Los Angeles—long before pervasive videos recorded on twenty-first-century smart phones and body cameras revealed the lethal effects of similar use-of-force policies in police departments all around the country. But Justice Marshall's dissenting opinion in *Lyons* makes painfully clear that the Court already had a disturbing record of racially motivated police violence before it. Along with the expansion of the defense of qualified immunity doctrine and the government's indemnification of officers who are held liable for monetary damages,[131] *Lyons*'s denial of standing for injunctive relief legally endorsed a culture of relative impunity.

p. 309 In other instances, anticipatory trauma offers a highly visible justification *supporting* statist intervention. In *Gonzales v. Carhart*, as Jeanne Suk has brilliantly shown, the Supreme Court relied on a theory of so-called traumatic abortion regret to uphold a statute banning partial birth abortion.[132] The theory of the majority opinion was that learning details regarding a specific abortion procedure *after the fact* could be so retrospectively traumatizing for the woman as to justify outlawing the procedure altogether, even when administered with the patient's informed consent. As Suk notes, the Court not only appropriated second-wave feminist trauma theory associated with battered women's syndrome and rape to supposedly protect women from abortion, it did so *proleptically*—converting a potential, anticipated traumatic event into a state interest that legitimates prospective legislative interference with the doctor-patient relationship.[133] Or consider the relationship between the endorsement of vicarious "participant-observer" PTSD in American television viewers who watched the repeatedly looped September 11, 2001, terrorist attacks and the torture, targeted killing, and seemingly permanent suspension of civil liberties that followed as the United States entered a state of exception in order to prevent future attacks.[134]

What all of the final examples have in common is the expansion of the legal, regulatory, and biopolitical reach of the state under the aegis of averting traumatic experience (crime, abortion regret, future national security threats), vindication and reification highly charged understandings of individual and collective memory under the aegis of a fragile, anxiety-ridden concept of security, and externalization the costs onto marginalized populations on terms that all too frequently cause further trauma. Felman insists that trauma is the basic underlying reality of law, but law is clearly an underlying reality of trauma too. Law not only stumbles in the face of traumatic memory, struggles to assimilate it, recoils even; it is in and of itself a source of trauma, and it sometimes appropriates the threat of future trauma to underwrite violent statist interventions. Notice the strange conjunction of temporalities here—amnesic with regard to mass historical injustices, stubbornly presentist and/or perfectionist regarding their lingering manifestations, and yet paranoid with regard to potential future traumas of concern to the state. The law arrives both too late, if at all, and far too early. Moreover, the legal subject of this law is no longer a hypermasculine, rugged individual but instead a simultaneously hypervigilant, proleptically symptomatic, and yet forgetful individual dependent on the state and experts for recognition.[135]

p. 310 In his pathbreaking study of anticipatory trauma, Paul Saint-Amour contends that the dreadful temporality constituted by surviving one trauma and living in the near certainty of another—a temporality in which anticipation itself becomes "weaponiz[ed]"—is a broader cultural inheritance of the interwar period.[136] The memory of World War I air raids in European metropoles and order maintenance bombings in colonial outposts during the interwar period weighed upon and deepened anxieties about the next war and even more deadly air power, turning time "and anticipation in particular … [into] a new medium of delivering injury."[137]

> [T]he aerial bombing of civilians and population centers[] fundamentally altered the temporality of urban experience, turning cities and towns into spaces of rending anticipation … [where] the dread of another massive conflict saturated the Anglo-European imagination, amounting to a proleptic mass traumatization *… whose symptoms arose in response to a potentially oncoming rather than an already realized catastrophe*. … During those years … the memory of one world war was already joined to the specter of a second, future one, framing the period in real time as an interwar era whose terminus in global conflict seemed, to many, foreordained.[138]

In this period, "a future event becomes a force in the present, producing effects in advance of its arrival" as the "memory of one conflagration is shadowed by the suspicion or conviction that another, even worse one, is in the offing."[139] An uncanny temporality accompanies anticipatory trauma of this kind: anxiety is "routinized"[140]; people find themselves "waiting for the unprecedented to return"[141]; the symptoms induced by "false alarms" may be as powerful those produced by a real threat[142]; and the future itself becomes warped, "worthless," "foreclosed," delivering only the "foregone conclusion" of a new collective catastrophe.[143] We know that Freudian thought stresses the retrospective dimensions of traumatic experience—the delayed psychic action of a past traumatic experience working in, through, and as repressed memory.[144] Saint-Amour draws our attention to the present effects of a future event that is all the more disabling, all the more powerful an object of dread, because it reproduces, adaptively iterates, and promises to be more painful than the event already fixed in memory.

He also reveals the role of law in interwar anticipatory trauma, most alarmingly the failure of international law advocates, who were all too familiar with the technological innovations of warfare from their own military experience, to agree to rules in the 1920s that would have constrained air power even as its unrivaled capacity for the destruction of civilian life became undeniable. "[P]rospective signatories" to the
p. 311 1923 Hague Commission rules on the use of force "were unwilling to rule out targeting urban ↳ factories, war-industry workers, and civilian morale of their adversaries in a future conflict" not just because they doubted the enforceability of such laws in the heat of war but, more fundamentally, because total war theory had already posited the strategic significance of leveling massive strikes against civilian populations "*before war was formally declared* … while the law was asleep. … Even if they were ratified, legal guarantees of civilian immunity would hold only until the moment before they were needed."[145] Why bother to adopt laws whose futurity is already foreclosed by the inexorably expanding technologies of annihilation and the theories of war that rationalize their preemptive use?

The complicity of law in the anticipatory trauma of interwar experience is even more starkly evident, Saint-Amour suggests, in the imperial projects of Western twentieth-century powers. The British RAF relied on air raids across the Middle and Near East in the interwar period both for the purpose of "colonial policing" and as an experiment and public relations exercise designed to prove that air power "could efficiently and affordably contribute to ‘imperial defense.’ ”[146] Between 1922 and 1932 “air control over Iraq … provided an alternative to ground occupation at a fraction of the cost in soldiers’ lives and pounds sterling” and the RAF was fond of explicitly racializing its fictional targets in displays of air power conducted back home.[147] But “[b]ecause the violence wrought” by the British empire, for example, “took place outside the boundaries of the national body, such violence went virtually unacknowledged by classical air power theory and other forms of next-war discourse, including international law.”[148] Indeed, the law failed to treat “anti-colonial or national liberation movements” as armed conflicts subject to the laws of war (and war crimes) until 1977, thus freeing the RAF to use “the imperial periphery as a testing range.”[149]

And we remain “interwar” to this day, Saint-Amour insists, not just because of the seemingly irreversible fact of nuclear proliferation and first-strike capabilities—the ever looming possibility of a nuclear apocalypse—but because “even when wars end formally, a state’s legal war powers can persist long after the surrender documents have been signed,” and the state’s emergency powers are spectacularly elastic.[150] Drawing on the work of Mary Dudziak, Saint-Amour notes that in the United States “the only non-war period after World War II, other than a period of seven months in 1990, was from October 15, 1976 to November 4, 1979.”[151] Thus although in theory a state of war is supposed to be “superseded by the rule of law when peacetime resumes,” it is the arrival of peace and the ordinary operation of law that increasingly appears a rare, constantly deferred exception to states of emergency.[152] Indeed, if we focus on the “real-time experience of remembering past war,” which is never fully past, “while awaiting and theorizing a future one[,] we begin to see how a period could go on, even in near perpetuity, feeling like an interwar era.”[153]

p. 312

16.4 Living with Trauma

> “ ‘What we cannot reach flying, we must reach limping. … The Book tells us it is no sin to limp.’ ”[154]

In closing I want to make two extrapolations from Saint-Amour’s concept of anticipatory trauma. First, the link between traumatic memory and the anticipation of future traumatic experience offers a perhaps more penetrating explanation for the vernacularization of trauma than the formal recognition of PTSD in the late twentieth century. After 1945, after the bombing of Hiroshima and Nagasaki, the anticipatory trauma of air war becomes generalized, ominously quotidian. We suffer not only paralyzing fear and amnesia about the bombs we know are raining down on civilian populations around the world at any given point in time, and about our habituation to the enduring states of emergency that serve as predicate and provocation for this bombing, but about the existential threat posed by atomic warfare … *the* bomb. It is one of the few truly universal conditions of late twentieth- and early twenty-first-century life. Paradoxically then, we find ourselves to be *perpetually* interwar.[155] The “interwar,” Saint-Amour insists, names “a wound *that remains open in the present*”—open both because the military and cultural legacy of the period has so profoundly shaped modernist sensibilities, and because we see “the futures past of the historical interwar period … as still partly continuous with our own futurities.”[156] To be perpetually interwar, on this view, is to be perpetually intertrauma, anxiously awaiting the arrival of an already “foreclosed” future.

And we are not only inter*war*. Total war is but one of the more volatile elements of modern social life that “alters the experience of space and time … warps sociality’s forms … [and yet] becomes routinized, expected, almost ordinary.”[157] The #MeToo movement has exposed the extent to which women and other vulnerable people remain perpetually inter-rape, haunted by the memory of sexual assault (personal, mediated, and historical) and prone to (re)victimization in an astonishingly wide array of social settings despite legal reforms designed to eliminate precisely this threat.[158] The Black Lives Matter movement has exposed the perpetual inter-lynching status of African Americans and the extent to which this status is enforced by officers of the law on public streets—all too often, it must be said, in broad daylight and at the

p. 313 behest of white people ↳ paranoid about the appearance of black bodies in civic space.[159] And the We Are All Kahled Said Facebook feed continues to archive, nearly a decade after the protests in Tahrir Square, the inter-torture status of citizens who dare to demand legal reforms from systematically oppressive regimes.

Thus, while the vernacularization of trauma may reflect the kind of opportunism that triggers suspicion about fraud, malingering, psychotherapeutic suggestion, and false recovered memory, and while it may raise the specter of a feminization of rugged individualism, of a disabling attachment to injury, and of interprofessional competition for authority, it also expresses a basic fact of modern life: the inexorable reproduction of traumatic experience in an age ostensibly defined by the principles of enlightenment, material and technological innovation, and the rule of law. As Foucault predicted in a 1963 essay, the "twentieth century will undoubtedly have discovered the related categories of exhaustion, excess, the limit, and transgression—the strange and unyielding form of these irrevocable movements which consume and consummate us."[160]

Perhaps then, and here is the final point, the mistake is the effort to fully assimilate traumatic experience in the first place, our collective obsession with a future perfect in which law and other authoritative narrative practices redeem past trauma and arrest its reproduction. Perhaps instead the underlying premises of a legal order that is itself complicit in the reproduction of trauma—one that keeps promising a future it cannot deliver, one that constantly excuses its past and present failings in the perfectionist future tense of rights-talk—should itself be interrogated. As Saint-Amour notes, this interrogation has begun in some recent iterations of queer theory—in Heather Love's analysis of "ruined subjectivity" and "a politics that allows for damage"[161]; as well as in Lee Edelman's strident commitment to negativity, "to the primacy of a constant *no* in response to the law of the symbolic."[162] Edelman interrogates "the very space that 'politics' makes unthinkable: the space … outside the conflict of visions that share as their presupposition that the body politic must survive … the place of the social order's death drive."[163] This of course demands a radical critique of identity ("of every substantialization of identity"), of history (of representations of time "as linear narrative (the poor man's teleology) in which meaning succeeds in revealing itself"), and of law as an
p. 314 essential instrument in both projects—both the constant substantialization of identity in the ↳ sovereignty of a rights-bearing subject and the fixation of meaning and collective memory in linear, forensically authenticated history.[164]

There are important parallels between Edelman's account of future perfect resistance to "negativity"—the perpetual "demand to translate the insistence, the pulsive *force*, of negativity into some determinate space or 'position' whose determination would thus negate it"[165]—and the seemingly irresistible desire to assimilate, narrate, adjudicate, and thereby emplot and redeem traumatic memory, to move decisively into an afterward, a posttraumatic period neither haunted by traumatic memory nor overshadowed by traumatic anticipation.[166] Is there a practice of justice that does not demand the negation of negativity? One capable of affirming the pulsive, inter-temporal, subject-rending force of living *with*, not after, trauma and its reproduction? *With* the foreclosure of the future perfect and all its more perfect unions? Or is this transgressive, queer project a pernicious nihilism traveling by another name—a project anathema to all imaginable orders of law?

These are, in my view, the most pressing twenty-first-century questions for the trauma/memory/law circuit. Answers with which we can live might begin by evaluating transgressive forms of living *with* trauma, with a foreclosed future, with the admission that the sources of traumatic experience (racism, misogyny, homophobia, exploitation, poverty, genocide, the threat of nuclear Armageddon, etc.) are ineradicable conditions of modern life … which must nevertheless be opposed. Holocaust countermonuments,[167] Foucault's concept of countermemory,[168] the African American blues tradition, the protest stagecraft of Pussy Riot,[169] the dissident activities of the Czech underground in the 1970s,[170] and a wide range of contemporary literary and visual art,[171] all share what Ellison called "an impulse to keep the painful details and episodes of a brutal experience alive in one's aching consciousness, to finger its jagged grain."[172] If

p. 315 there is a kind of transcendence or catharsis on offer in this “aching” historical consciousness, and Ellison ↳ believed there is, it arrives “not by the consolation of philosophy”—not, that is, by metaphysical sleight of hand or the fantasy of redemption in the future tense of ordinary liberal politics, but rather “by squeezing from [brutal experience] a near-tragic, near-comic lyricism.”[173]

The blues form, the central aesthetic element in what Ellison elsewhere insisted African Americans have practiced “in the place of freedom,”[174] involves not merely a precipitously direct angle of approach to the jagged grain of traumatic experience. It involves syncopated rhythmic play upon the traditional role of peripeteia in tragedy (defiantly lingering, returning, oscillating *within* the catastrophic, rather than moving beyond it, after it, or otherwise seeking to fix it in the past), and an at once ironic, absurdist, queer, disposition toward denouement (hence the minor-key “near” in “near-tragic, near-comic lyricism” undercutting the resolution found in traditional tragic and comic forms). Put simply, the blues is a form of non-redemptive struggle—refusing both nihilism *and* the baleful “consequences of grounding reality in denial of the [death] drive.”[175] It shares with other transgressive forms of living with trauma precisely this concept of non-redemptive struggle.

From this perspective, the most important question for the law and any reconfiguration of the trauma/memory/law circuit (hard-wired as it is to the yawning gap between what modernity promises and what it delivers) does not concern the minutiae of a specific reform, remedy, or jurisprudential innovation—activations of the circuit that simply “instigat[e] new dominations.”[176] It concerns the capacity of lawyers and judges to internalize this disposition of living with, not after, trauma. For sworn officers of the court this demands uncomfortable memory work: taking, as a condition of any reconfiguration of the circuit, direct responsibility for the limitations of the law, openly confronting the history of law’s failure *in* the circuit, and admitting their pleasure “in the promised blood” of “seizing the [] rules” in order to see justice done.[177] They must linger upon the disfigured face of Khaled Said and recognize in the imperative to see
p. 316 justice ↳ done the darkness of their own sanguinary will to power, all without letting that understanding “kill action.”[178]

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8 Ibid., 62.

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10 Ibid., 61–62.

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37 See ibid., 121–146.

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51 Josef Breuer and Sigmund Freud, "Studies on Hysteria," In *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, vol. 2, ed. James Strachey (London: Hogarth Press, 1955), 7; see also Sigmund Freud, "The Aetiology of Hysteria," In *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, vol. 3, ed. James Strachey (London: Hogarth Press, 1955), 192–193 ("symptoms of hysteria … are being reproduced in his psychical life in the form of mnemic symbols").

52 Howard B. Levine, "Psychoanalysis, Reconstruction, and the Recovery of Memory," in *Trauma and Memory: Clinical and Legal Controversies*, ed. Paul S. Applebaum, Lisa A. Uyehara, and Mark R. Elin (New York: Oxford University Press, 1997), 293–315, 294, 300; Maria C. Sauzier, *Memories of Trauma in the Treatment of Children*, in *Trauma and Memory: Clinical and Legal Controversies*, ed. Paul S. Applebaum, Lisa A. Uyehara, and Mark R. Elin (New York: Oxford University Press, 1997), 378–393, 387; Saint-Amour, *Tense Future*, 15. For a critique of the mental/physical binary in traditional trauma studies, see Peter A. Levine, *Waking the Tiger: Healing Trauma* (Berkeley, CA: North Atlantic Books, 1997).

53 Caruth, *Literature in the Ashes*, 5–6; cf. Saint-Amour, *Tense Future*, 1 ("the unassimilable nature of traumatic violence would seem to depend on the impossibility of its anticipation").

54 Luckhurst, *Trauma Question*, 21.

55 Ibid., 26.

56 Ibid., 22.

57 Ibid., 25.

58 Ibid., 27.

59 Ibid., 24.

60 Ibid.

61 Ibid., 23.

62 Ibid., 24.

63 Ibid., 49; Young, "Posttraumatic Stress Disorder," 23.

64 Luckhurst, *Trauma Question*, 50–51.

65 Ibid.

66 Ibid., 51.

67 Ibid., 52.

68 Ibid., 50–53.

69 Ibid., 57.

70 Ibid., 63.

71 Brunner, "Trauma and Justice," 107.

72 Luckhurst, *Trauma Question*, 1.

73 Ibid., 25, 34.

74 Ibid., 11.

75 Luckhurst attends closely to cultural manifestations of the "trauma paradigm" from the late 1980s through the 2000s, particularly in America. See Luckhurst, *Trauma Question*, 79–208.

76 See, for example, Nina Silber, *The Romance of Reunion: Northerners and the South, 1865–1900* (Chapel Hill: University of North Carolina Press, 1993); Booth, *Communities of Memory*, 44–51.

77 Søren Kierkegaard, *Either/Or*, ed. and trans. Howard and Edna Hong (Princeton, NJ: Princeton Univ. Press, 1987), 143–147.

78 See Caruth, *Unclaimed Experience*, 117 ("a kind of not-knowing at the heart of catastrophic experience"). See also Caruth, *Literature in the Ashes*, 80 (psychoanalysis bears witness "to the shock of a history it cannot assimilate but only repeat").

79 Freud, *Beyond the Pleasure Principle*, 14.

80 Robert M. Galanter-Levy, "Psychoanalysis, Memory, and Trauma," in *Trauma and Memory: Clinical and Legal Controversies*, ed. Paul S. Applebaum, Lisa A. Uyehara, and Mark R. Elin (New York: Oxford University Press, 1997), 108–157, 142.

81 Brunner, "Trauma and Justice," 98.

82 Caruth, *Literature in the Ashes*, ch. 1.

83 See Caruth, *Unclaimed Experience*, 103, 107. The DSM-III's broad definition of PTSD arguably contributes to this definitional oscillation.

84 See Renato Rosaldo, "Imperialist Nostalgia," *Representations* 26 (1989): 107–122, 107–108 ("agents of colonialism long for the very forms of life they intentionally altered and destroyed [and this nostalgia can] transform the responsible colonial agent into an innocent bystander"). See also ibid., 111, 119–120 (on the complicity of anthropologists). See also Caruth, *Unclaimed Experience*, 117 (discussing critiques of the "Eurocentric perspective of … 'classical' trauma theory"); Bird and Ottanelli, *Performance of Memory*, 2 (same).

85 Ian Sample, "One-Star Restaurant Reviews Show Signs of Trauma, Linguists Say," *The Guardian*, Feb. 15, 2015; Mark Banschick, "Every Day Trauma: 8 Ways to Feel Better," *Psychology Today*, Jan. 9, 2013 ("I wonder if all the stress of contemporary life is a form of complex trauma. I call these injuries micro traumas…."); see also Luckhurst, *Trauma Question*, 3 (describing the "worryingly transmissible" aspect of trauma).

86 Levine, "Psychoanalysis, Reconstruction, and Recovery of Memory," 297, 303. Popular representations of this are abundant. See, for example, the film *The Tale*, directed by Jennifer Fox (2018, Gamechanger Films).

87 Luckhurst, *Trauma Question*, 33–35, 36, 52.

88 See Ira E. Hyman, Jr. and Elizabeth Loftus, "Some People Recover Memories of Childhood That Never Really Happened," in *Trauma and Memory: Clinical and Legal Controversies*, ed. Paul S. Applebaum, Lisa A. Uyehara, and Mark R. Elin (New York: Oxford University Press, 1997), 3–24, 9–13; Levine, "Psychoanalysis, Reconstruction, and Recovery of Memory,", 306–310. See also Young, "Posttraumatic Stress Disorder," 24–25; Luckhurst, *Trauma Question*, 73; Felman and Laub, *Testimony*, 59–60.

89 Jay Winter, *Remembering War: The Great War Between Memory and History in the Twentieth Century* (New Haven, CT: Yale University Press, 2006), 64–67.

90 Ibid.

91 In contradistinction to Freud's position that traumatic memory is "immutable," and research confirming that certain aspects of traumatic experience are seared into memory, other research reveals that at least episodic memory is "intrinsically malleable" and "associative." Paul S. Applebaum, "Reflections on Trauma and Memory," in *Trauma and Memory: Clinical and Legal Controversies*, ed. Paul S. Applebaum, Lisa A. Uyehara, and Mark R. Elin (New York: Oxford University Press, 1997), 511–527, 514–515; see also Galanter-Levy, "Psychoanalysis, Memory, and Trauma," 141; Bessel A. van der Kolk, "Traumatic Memories," in *Trauma and Memory: Clinical and Legal Controversies*, ed. Paul S. Applebaum, Lisa A. Uyehara, and Mark R. Elin (New York: Oxford University Press, 1997), 246–252. On the "polysemic … malleable" attributes of collective memory, see Jeffrey K. Olick and Joyce Robbins, "Social Memory Studies: From 'Collective Memory' to the Historical Sociology of Mnemonic Practices," *Annual Review of Sociology* 24 (1998): 105–140, 127–128.

92 van der Kolk, "Traumatic Memories," 246.

93 Luckhurst, *Trauma Question*, 68.

94 Ibid., 3; Applebaum, 523; Booth, *Communities of Memory*, 62; Levine, "Psychoanalysis, Reconstruction, and Recovery of Memory," 310–311.

95 Richard J. Evans, "History, Memory, and the Law: The Historian as Expert Witness," *History & Theory* 41, no. 3 (2002); 326–345.

96 Felman and Laub, *Testimony*, 69; Saint-Amour, *Tense Future*, 4–5, 14.

97 Julia A. Golier, "Memory and Posttraumatic Stress Disorder," in *Trauma and Memory: Clinical and Legal Controversies*, ed. Paul S. Applebaum, Lisa A. Uyehara, and Mark R. Elin (New York: Oxford University Press, 1997), 225–242.

98 Caruth, *Literature in the Ashes*, ch. 5.

99 Norman W. Spaulding, "Resistance, Countermemory, Justice," *Critical Inquiry* 41 (2014): 132–152.

100 Levine, "Psychoanalysis, Reconstruction, and Recovery of Memory," 297.

101 Luckhurst, *Trauma Questions*, 74.

102 Shoshana Felman, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (Cambridge, MA: Harvard University Press, 2002), 175.

103 Luckhurst, *Trauma Questions*, 1, 13.

104 Freud, *Beyond the Pleasure Principle*, 24.

105 Felman, *Juridical Unconscious*, 172.

106 Ibid., 4.

107 Ibid., 5, 150.

108 Ibid., 144, 150.

109 Stiina Loytomaki, *Law and the Politics of Memory* (New York: Routledge, 2014), 73.

110 Eric Lichtbrau, "The Painstaking Hunt for War Criminals in the United States," *New Yorker*, July 22, 2018. More broadly, see Olivera Simic, *An Introduction to Transitional Justice* (New York: Routledge, 2017); Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2002). On the problems of time and retroactivity, see Booth, *Communities of Memory*, 116.

111 See Loytomaki, *Law and Politics of Memory*, 53–56; Felman and Laub, *Testimony*, 59–60.

112 See Robert A. Kahn, *Holocaust Denial and the Law: A Comparative Study* (New York: Palgrave Macmillan, 2004); see also Loytomaki, *Law and Politics of Memory*, ch. 4.

113 See Booth, *Communities of Memory*; Volker Roelcke, "Trauma or Responsibility? Memories and Historiographies of Nazi Psychiatry in Postwar Germany," in *Trauma and Memory Trauma and Memory: Reading, Healing, and Making Law*, ed. Austin Sarat, Michal Alberstein, and Nadav Davidovitch (Stanford, CA: Stanford University Press, 2007), 225–242, 230; Loytomaki, *Law and Politics of Memory*, 32, 47.

114 Many of these themes are explored in Caruth's excellent analysis of the Ariel Dorfman play "Death and the Maiden." See Caruth, *Literature in the Ashes*, 54.

115 Jeremy Waldron, "Superseding Historical Injustice," *Ethics* 103 (1992): 4–28. Cf. Booth, *Communities of Memory*, 118.

116 See Stephen Kershnar, *Justice for the Past* (Albany: State University of New York, 2004), 44–46; Christopher W. Morris, "Existential Limits to the Rectification of Past Wrongs," *American Philosophical Quarterly* 21 (1984): 175–182, 176–178.

117 See Booth, Communities of Memory, passim; Seana Valentine Shiffrin, "Reparations for U.S. Slavery and Justice Over Time," in *Harming Future Persons: Ethics, Genetics and the Nonidentity Problem*, ed. Malinda A. Roberts and David T. Wasserman (New York: Springer, 2009); 333–339, 334–335; Janna Thompson, "Historical Responsibility and Liberal Society," *Intergenerational Justice Review* 9 (2009): 13–17; Janna Thompson, "Historical Injustice and Reparation: Justifying the Claims of Descendants," *Ethics* 112 (2001): 114–135.

118 See, e.g., In re African-Am. Slave Descendants Litig., 471 F.3d 754, 763 (7th Cir. 2006); United States v. Hatahley, 257 F.2d 920 (10th Cir. 1958); Ariela Gross, "When Is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument," *California Law Review* 96, no. 1 (2008): 283–321; Matthew L. M. Fletcher, "The Supreme Court's Indian Problem," *Hastings Law Journal* 59, no. 3 (2008): 579–642, 623–624.

119 Ellison has emphasized that "[p]erhaps more than any other people, Americans have been locked in a deadly struggle with time, with history. We've fled the past and trained ourselves to suppress, if not forget, troublesome details of the national memory, and a great part of our optimism, like our progress, has been bought at the cost of ignoring the processes through which we've arrived at any given moment in our national existence." Ralph Ellison, "The Blues," review of LeRoi Jones's *Blues People* in *The New York Review of Book*s, Feb. 6, 1964. Compare Robert Leicht's claim against the conservative revisionists during the Historikerstreit of the 1980s (the "historians' " controversy) that the German people would always, after the Holocaust, have to live with a "broken relationship" to their history, standing forever "in the shadow of a history that we can no longer heal." Robert Leicht, "Only by Facing the Past Can We Be Free: We Are Our Own Past: German History Should Not Be Retouched," in *Forever in the Shadow of Hitler?: Original Documents of the Historikerstreit*, trans. James Knowlton and Truett Cates, ed. Ernst Piper (Atlantic Heights, NJ: Humanities Press, 1993), 244–248, 248.

120 On the mixed effects of privileging symbolic reparations, see Ana Lucia Araujo, *Reparations for Slavery and the Slave Trade: A Transnational and Comparative History* (London: Bloomsbury Academic, 2017), 178.

121 See Sanford Levinson, *Written in Stone: Public Monuments in Changing Societies* (Durham, NC: Duke University Press, 1998).

122 Much depends on whether the removed statues are destroyed or preserved in settings that relate their proliferation to the history of white supremacy. See Jonah Engel Bromwich, "University of Texas at Austin Removes Confederate Statues in Overnight Operation," *N.Y. Times*, Aug. 21, 2017; Noah Caldwell and Audie Cornish, "Where Do Confederate Monuments Go After They Come Down?," NPR, Aug. 5, 2018.

123 Cf. Norman W. Spaulding, "The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial," *Yale Journal of Law & Humanities* 24, no. 1 (2012): 311–344, 340.

124 See Judith Butler, *The Psychic Life of Power: Theories in Subjection* (Stanford. CA: Stanford University Press, 1997), 56 ("The 'afterlife' of prohibited desire is in the prohibition itself."); see also ibid., 81, 103. Cf. Judith Butler, *Subjects of Desire: Hegelian Reflections in Twentieth Century France* (New York: Columbia University Press, 1999), 186–204.

125 Samera Esmeir, *Juridical Humanity: A Colonial History* (Stanford, CA: Stanford University Press 2012), 11.

126 Ibid., 3, 10.

127 Ibid., 8.

128 See David Fraser, *Law After Auschwitz: Towards a Jurisprudence of the Holocaust* (Durham, NC: Carolina Academic Press, 2005). See also the excellent essay reviewing Fraser's book, Thomas Mertens, "Continuity or Discontinuity of Law?," *German Law Journal* 8 (2007): 533–546, 534.

129 Saint-Amour, *Tense Future*.

130 461 U.S. 95 (1983).

131 See John C. Jeffries Jr., "What's Wrong with Qualified Immunity," *Florida Law Review* 62 (2010): 851–869.

132 Jeannie Suk, "The Trajectory of Trauma: Bodies and Minds of Abortion Discourse," *Columbia Law Review* 110, no. 5 (2010): 1193–1252.

133 Ibid., 1236–1237, 1246.

134 Young, "Posttraumatic Stress Disorder," 21; Saint-Amour, *Tense Future*, 16. On the legal implications of the response to the September 11 attacks, see David Luban, *Torture, Power, and Law* (Cambridge: Cambridge University Press, 2014); Claire Finkelstein, Jens David Ohlin, and Andrew Altman, *Targeted Killings: Law and Morality in and Asymmetrical World* (Oxford: Oxford University Press, 2012).

135 See Wendy Brown, *States of Injury: Power and Freedom in Later Modernity* (Princeton, NJ: Princeton University Press, 1995); Anthony Paul Farley, "Law as Trauma (and) Repetition," *N.Y.U. Review of Law and Social Change* 31 (2007): 613–626, 617–619 ("The perfection of slavery is the struggle for law. … The rule of law is the trauma-conceived idea that escapes the slave's mind only to stand over and above the slave as god.").

136 Saint-Amour, *Tense Future*, 8.

137 Ibid., 7.

138 Ibid., 7–8 (emphasis added).

139 Ibid., 12–13, 306.

140 Ibid., 62.

141 Ibid., 65.

142 Ibid., 111.

143 Ibid., 8, 12, 13.

144 Ibid., 18.

145 Ibid., 70.

146 Ibid., 73.

147 Ibid., 75–86.

148 Ibid., 72.

149 Ibid., 72–73.

150 Ibid., 304.

151 Ibid.

152 Ibid., 305.

153 Ibid.

154 Freud, *Beyond the Pleasure Principle*, 78.

155 Ibid.

156 Saint-Amour, *Tense Future*, 37 (emphasis added).

157 Ibid., 95.

158 Ronan Farrow, "From Aggressive Overtures to Sexual Assault: Harvey Winestein's Accusers Tell Their Stories," *New Yorker*, Oct. 23, 2017. See also Aparna Nancherla, "Who Gets a Second Chance," *N.Y. Times*, Sept. 1, 2018; William D. Cohan, "Women Say a Rigged System Allows Wall Street to Hide Its Sexual-Harassment Problem," *New Yorker*, Jan. 7, 2018; Jessica Bennett, "The #MeToo Moment: No Longer Complicit," *N.Y. Times*, Dec. 7, 2017; Somini Sengupta, "The #MeToo Moment: What Happened After Women Broke the Silence Elsewhere?," *N.Y. Times*, Dec. 22, 2017.

159 See Daniel Victo, "When White People Call the Police on Black People," *N.Y. Times*, May 11, 2018; Timothy Williams, "Study Supports Suspicion that Police Are More Likely to Use Force on Blacks," *N.Y. Times*, July 7, 2016 (describing empirical research showing that "although officers employ force in less than 2 percent of all police-civilian interactions, the use of force is disproportionately high for African Americans – more than three times greater than for whites"); Matt Apuzzo, "Charges Sought in Eric Garner's Death, but Justice Officials Have Doubts," *N.Y. Times*, Apr. 20, 2018; Investigation of the Ferguson Police Department, United States Department of Justice, March 4, 2015.

160 Michel Foucault, "A Preface to Transgression," in *Language, Counter-Memory, Practice*, ed. Donald F. Bouchard (Ithaca, NY: Cornell University Press, 1977), 29–52, 49.

161 Saint-Amour, *Tense Future*, 22, n.32.

162 Lee Edelman, *No Future: Queer Theory and the Death Drive* (Durham, NC: Duke University Press 2004), 5; Saint-Amour, *Tense Future*, 29–30.

163 Edelman, *No Future*, 3.

164 The "law" implicated in this critique is law in the very widest linguistic sense of Lacan's Symbolic Order, not merely the juridical structures for the administration of justice. Ibid., 7, 29.

165 Ibid., 4.

166 Edelman makes the connection explicit in writing that the queer embodies the social "order's traumatic encounter with its own inescapable failure." Ibid., 26.

167 James E. Young, *The Texture of Memory: Holocaust Memorials and Meaning* (New Haven, CT: Yale University Press, 1994).

168 Spaulding, "Resistance, Counter-Memory, Justice."

169 Gessen writes that one must be able to live in and indeed cultivate a "constant state of discomfort" to engage in "protest art"; but the discomfort cannot paralyze—"One also has to possess … the sense of being entitled to speak and to be heard." Masha Gessen, *Words Will Break Cement: The Passion of Pussy Riot* (New York: Riverhead Books, 2014).

170 Jonathan Bolton criticizes Vaclav Havel's "metaphysical" narrative and insists on the movement's desire both to "destroy the establishment and to ignore it … one of the formative contradictions for the whole underground experience … [captured] in the two values" of "zbesilost (madness or rage) and pokora (humility)." *Worlds of Dissent: Charter 77, The Plastic People of the Universe, and Czech Culture Under Communism* (Cambridge, MA: Harvard University Press, 2012), 128.

171 See discussion of Ariel Dorfman's play *Death and the Maiden*: Caruth, *Literature in Ashes*, ch. 4. See also Felman and Laub, *Testimony*.

172 Ralph Ellison, review of Richard Wright's *Black Boy*. Reprinted in *Shadow and Act*.

173 Ibid.

174 Ellison, "The Blues."

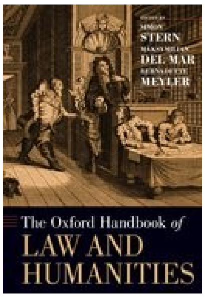
175 Edelman, *No Future*, 17.

176 Foucault, "Preface to Transgression," 151.

177 Ibid. (The original French is "La règle, c'est le plaisir de l'acharnement, c'est le sang promis"). I have written extensively about what this responsibility would entail in the context of American constitutional interpretation. See Norman W. Spaulding, "Redeeming the American Founding?," in *The Oxford Handbook of Legal History*, ed. Markus Dubber and Christopher Tomlins (New York: Oxford University Press, 2018), 1017–1042; Norman W. Spaulding, "Paradoxes of Constitutional Faith: Federalism, Emancipation, and the Original Thirteenth Amendment," *Critical Analysis of Law* 3 (2016): 306–334; Norman W. Spaulding, "Remembering Our Second Revolution: Sesquicentennial Reflections on Civil War Historiography," in *Union and States' Rights: A History and Interpretation of Interposition, Nullification, and Secession 150 Years After Sumter*, ed. Neil Cogan (Akron, OH: University of Akron Press, 2014), 260–286; Norman W. Spaulding, "Constitution as Counter-Monument: Federalism, Reconstruction and the Problem of Collective Memory," *Columbia Law Review* 103 (2003): 1992–2051. On the desire of lawyers and judges to affirm the rules of a new regime, particularly when they have been complicit in the injustices of the prior regime, see Loytomaki, *Law and Politics of Memory*, 52–53; see also "Mubarak Acquitted in Final Ruling on Egypt's April Spring Deaths," *The Guardian*, Mar. 2, 2017; David D. Kirpatrick and Merna Thomas, "Egyptian Judges Drop All Charges Against Mubarak," *N.Y. Times*, Nov. 29, 2014.

178 Friedrich Nietzsche, "The Birth of Tragedy," in *The Birth of Tragedy and Other Writings*, ed. Raymond Geuss and Ronald Speirs (Cambridge: Cambridge University Press 1999), 1–116, 40.

1 Michel Foucault, "Nietzsche, Genealogy, History," in *Language, Counter-Memory, Practice*, ed. Donald F. Bouchard (Ithaca, NY: Cornell University Press 1977), 139–164, 153.



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CHAPTER

17 Challenging the Legal Self Through Performance

Marett Leiboff

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Abstract

This chapter reconsiders and reorients performance as a critical practice in law and the humanities, turning away from the philosophically and sociologically inflected variants of performance and performativity, toward the possibilities of performance and the theatrical as jurisprudence. In its Kantian ideal, law is expected to function in isolation and absent the self. Performance and the theatrical could not think more differently, creating conditions that enable bodily responses to engender responsiveness that affords the possibility of *noticing*. This ability to notice is lost in abstraction, but it is needed to enliven and point to failures or fractures in law. Lived experience provides the most potent means by which we notice; in its absence, performance offers the possibility to write experiences on our bodies, helping us to notice when law helps or hinders, harms or helps, showing us how easily law can offer or deny justice simply through the ability or inability of lawyers or justices to notice the effects and consequences of law. At least three registers of noticing can be identified through performance and into law. In no particular order, the first happens through the noticing body, triggering recognition of the consequences of a doctrine, principle, or provision because the lawyer has experienced the same or a cognate situation; the second comes from the dramaturgically grounded nodal knots binding together a present and a past and a past with a present; while in the third, bonds of recognition are created through and by association, or through training.

Keywords: Jerzy Grotowski, protest, theatrical jurisprudence, Richard Schechner, performance, 1968, dramaturgy, noticing, jurisography, responsibility

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17.1 1968

IN this chapter, I reconsider and reorient performance as a critical practice in law and the humanities, turning away from the philosophically and sociologically inflected variants of performance and performativity that have found a place in law and legal theory, toward the possibilities of performance for law as a practice grounded in *theater*. Let me be clear about the scope of my inquiry and the narrow ledge on which it sits. When I refer to law, I refer to law's texts and interpretative paraphernalia, whether acknowledged as part of those practices or not; when I refer to the possibilities of performance for law as a practice in theater, I refer to the actions of lawyers of all kinds, whether conscious or otherwise, in creating the conditions of that interpretation. Regardless of the shape performance in theater has taken since the 1950s, law has taken its own slant on the nature of performance. Its possibilities, complexities, limitations and difficulties have been charted by Julie Stone Peters,[1] but scant attention has been paid to the idea of performance as an ethically grounded practice bound up with and through obligations of response and responsibility, where we are primed to notice something of law that is otherwise unimaginable, that might be registrable through lived experience or obtained through the effects of performance.

p. 318 Performance of this kind bears little in common with law's imagined idea of the concept, as will be seen shortly. Created as the ethical twin of the forms of theater which grew out of the revolutionary spirt of 1968, performance was theater that stripped itself bare, that discarded the trappings of a theater of pretense, to become part of the actual as shaped through the political in the highly charged world of 1968. For 1968, in theater and in the world at large, was riven by extraordinary events, from student protests in France—*mai* '68—to Vietnam Moratorium demonstrations, to demonstrations in support of the liberation and civil rights movements, coalescing or ushering in fundamental social and political change.[2]

1968 functions as a useful nodal point to mark the starting point of the new field of performance. Shaped by its key founder Richard Schechner in New York (via the US South), Schechner's new conception and practice of performance challenged the assumptions of conventional theater. In his pathbreaking work, the infamous *Dionysus in 69*,[3] created with his theater group The Performance Group, actor and audience were now intertwined as a responsive and responding body,[4] inaugurating what Schechner was to later call environmental theater,[5] and which, unsurprisingly, had its first outings in 1968.[6] That work itself was grounded in the theater of the avant-garde as it had developed from the early twentieth century over the next sixty years, influenced by the work of the French director and visionary Antonin Artaud,[7] and influenced immeasurably by the work of Polish theater director and theorist Jerzy Grotowski, who, from the late 1950s until his theater's final production in New York in 1969 (and whose manifesto of theater practice was published through Schechner in 1968),[8] created a demanding training of the actor, the performer, and the spectator, in order to produce a theater of response and responsibility, grounded in a deeply shaped ethic.[9] That same year, English theater director Peter Brook published his own manifesto of the theater, *The Empty Space*, opening even more possibilities for a new understanding of performance through theater. Schechner would be influenced in turn by the sociologist Erving Goffman,[10] who drew on ideas derived from
p. 319 theater to conceive of a sociology of everyday interaction. ↳ Schechner was to shape performance into a field that moved from its origins in theater, creating and establishing the field of performance studies,[11] and in so doing triggered the performative turn that shaped the humanities and social sciences from the 1990s.[12]

For law, however, performance missed this originating moment in 1968, instead emerging on the cusp of the millennium as a fully fledged philosophical practice, influenced largely through the agency of Judith Butler's political performatives affording agency as self-actualization,[13] Eve Kosofsky Sedgwick's shaping of performance as a practice of politics,[14] through the turn to Goffman's performance-based sociology[15] and J. L. Austin's linguistic philosophy bound up in linguistic performatives.[16] This particular form of performance has shaped and marked a unique and largely universalizing concept of what performance means within law as a confined political praxis,[17] especially, though not exclusively, in its emancipatory and explicatory mode,[18] and as action bound up in the performative, as words. Otherwise performance functions as a visual and visible law in the form of the staging of trials,[19] where law is apprehended as a synonym of theater or performance, and vice versa,[20] where law as dramatic text is enacted and displayed,[21] thus assuming that law through performance is concerned with the technics and operation of power and authority. There is a slight irony, then, that in 1995, Parker and Sedgwick observed of performatives that "the term has hardly come to mean ↳ the same thing for each" (theater and philosophy).[22] Recently, p. 320 Margaret Davies has asked performance to encompass a "particular movement at a particular time and place,"[23] as a means of seeing law as fluid and embodied, as material and corporeal, as both performance and as performative,[24] suggesting yet more layers and possibilities of these two distinct but interrelated terms.

Regardless, it is not hard to see how performatives function as the prime site of performance in law. As theater and performance scholar Alan Read remarks: "[L]aw is, if anything, a performative mode of practice."[25] It is, but in its performative mode, performance has saturated law, exhausting or at least limiting the possibilities of performance as conceived through its origins in theater. But otherwise, as Peter Goodrich observes, it is the staging of law that has attracted the attention of scholars inside and outside law,[26] with its designated spaces and its forms of submission in a ritual of expectation. We find all of these functions in ten "rules of engagement" of "performance and law" that Read has marked out, offering a nuanced set of possibilities for law and performance beyond the limited confines that law has assumed of performance. In paraphrased form, these are:

1. Law has to be seen to be done,[27] as a "showing doing" (imbricating Schechner) involving agent and audience;
2. There is a narrative, that law has a beginning, middle, and end[28];
3. Law functions as power and contestation, and is experienced through the theatricalization or representation of law—as a human response[29];
4. Law operates through the rendering of experience as storytelling—to experience *experience* as "working through"[30];
5. There is a judicial spectacle that operates both as reality and as fiction—it is spectacular in the sense in which something has to happen, as action[31];
6. Through its performance, justice is served or otherwise, drawing on Gary Watt's *perforcemance*[32];
7. There is the operation of presentness—liveness as a theatrical concept over the realities of law[33];
8. Through J. L. Austin and the operatizing functions of law that has real effect[34];
9. Through swearing and seeking the truth through the performance of the oath, but also the proliferation of law without purpose, as marked by Agamben[35]; and
10. Through the deployment of wig and robe, and acts of effacement.[36]

p. 321 Thus law is performed, or is the object of display, or the subject of interpretation into play, or the staging of power, or the expression of the ideal of law, staged and visible, and through that visibility, an instance of law demonstrably expressed.[37] But there is something missing in these accounts of performance and performativity that Goodrich points to. The image of "enacted performances of lawyers themselves [] gains little express recognition or examination … the legal *mise en scène*, the juristic import and expression."[38] Such "enacted performances" bear scant associations with gavel banging, or impassioned speeches to jurors, or histrionics in witness boxes, or even courtrooms at all,[39] and this chapter will pursue a facet of this aspect of performance. That is not to say that there is no place for these other registers of performance.

Far from it. Along with Read's deeply considered account of law and performance, there is a deep and rich vein of scholarship in the fields of performance and theater that has extraordinary things to say about law and its deficits and its political practices,[40] and some of this work has flowed into law scholarship.[41] But what has been largely missing is a way of connecting these fields as a form of practice grounded within the field of law and humanities as a practice of cultural legal studies. Thus where performance, grounded in *theater*, enters into law, there is a tendency to look for the outcome, the practical as legal practice, as a demand "to pay up" or to meet preformed expectations of the sociological or philosophical. While those working within performance take the breadth of its practices for granted, including the theatrical (as Cormac Power remarks, "Performance cannot manage to extricate itself fully from the theatrical frame … even if a performance does not take place 'in a theatre' "),[42] law's version of performance has taken on its own logics, and can only be understood as a distinct field that bears little connection with performance's origins in 1968. The year 1968, imbricated within the realm of performance, therefore, bypassed law. Performance, in law, is a field of its own, and I propose that law return to the spirit of performance inaugurated in 1968, but recast through theater.

p. 322 Indeed, because performance has taken on the singular and perhaps confined shape that it has in law, I have avoided using it, choosing instead to draw on the language of theater,[43] in keeping with the field in Germany and Central Europe that encompasses performance within the nomenclature of theater.[44] There is a vast literature within the field of performance and theater studies about nomenclature and practice,[45] but I don't intend to enter into any of these debates, instead drawing on the insights of the field to think about law. And the facet of performance or theater that is ripe for consideration in law concerns something implicit in 1968—the formation of the performer or actor—or indeed spectator.

17.2 Noticing—Through and Beyond the Legal Self

Who we are and how we are formed is fundamental to performance and its demands and insistence on noticing, challenging, and seeking responses. This begins with understanding who we are and how we are formed. Richard Schechner tells us, for instance, of his age and philosophical and religious inclinations in his introductory performance studies book, for this very specific reason. We are forever shaped by our trajectory and histories, which are consciously welcomed in this field, for our lives lead us to notice and respond to the texts of performance, or the shaping of performance, and what this means for our ability to respond to the challenges of law, and to notice when law goes wrong.

Taking a new postgraduate course in theater studies in the mid-1980s at the University of New South Wales, years after completing a theater-inflected drama major within my Arts degree at the University of Queensland (begun in 1976, and documented by Robert Forster),[46] and as one of first three people who took
p. 323 a new school drama teaching course ↳ in 1979, have shaped me, irrevocably.[47] It's not a coincidence that Schechner and 1968 looms large in this account of performance (within theater rather than performance studies), for he was a dominating force in theater then, long before performance studies took shape. *Dionysus in 69*, itself an adaptation of Euripides' *The Bacchae*, and a foundational play in my first-year drama subject, had become legendary, not least for its demands on actors and audience, whose unclothed interactions led to an unwanted reputation, that of a group grope, that somehow turned up for discussion in my class at the University of Queensland in Brisbane, Australia in 1976.

The next year, in 1977, all hell broke loose in Brisbane, when street marches were banned by a repressive and corrupt government,[48] animating a theater on the streets and theaters of protest,[49] functioning precisely as the call of performance that Richard Schechner advocated. And this sets up a unique marker for a small group of people shaped uniquely by a set of circumstances in a relatively unknown set of events in a relatively unimportant city in Australia.[50] Robert Forster reveals something of the atmosphere of this place and time which created the spark of response and responsiveness borne out of injustice and violence, leaving those who lived through these events with an awareness and alertness toward instances where law is used to deny justice generally. Performance, too, enables this to happen by triggering an alertness and awareness in which our bodies start to *notice* and become aware.[51]

The ability to notice is fundamental to doing law well, for it functions as a small antecedent step that enlivens and points to failures or fractures in the operation of law. Lived experience provides the most potent means by which we notice, through our own pasts and presents (the lived experience of the self is bound up in Schechner's conception of performance), while the theatrical as performance provides the means to challenge all of us, to create response and responsiveness in the absence of lived experience, and which offers a means by which all of us can come to notice. Performance writes on our bodies, and is very different from observing drama or tragedy, sitting comfortably from afar. Law could not think more differently. Bodies, by and large, are an unwelcome distraction, the understanding of the self largely bypassed in favor of the Kantian ideal, and the self, by and large, abnegated. Histories, stories, pasts are stripped away from law and the lawyer; the law is expected to function in isolation and absent the self, who p. 324 has no ↳ role in assessing, analyzing, interpreting, and marking out the scope and expectation of law. The interventions of critical legal studies and feminist and critical race theory have made it clear that law is plainly grounded in the body. But as that scholarship makes clear, law is happy to notice bodies of others, but it barely recognizes when its foundational bodies, the men who created and shaped law's doctrines and principles, are brought to bear. These bodies, by and large, notice, through their own lives, too, but what and how they notice is very different if inhabited by a life untroubled by difference. But if he—a man who might not otherwise experience difference—lives through or experiences arrest at a protest march, he inevitably is changed through that experience. Something is inscribed into him, his body, and that pull of recognition or response is going to play out in his life forever. He might avoid street marches and become opposed to the politics that led him to protest, it might make him sympathize and empathize with others who are denied the possibility of protest, or he might take action as a result of his experience. He might notice, as a lawyer, the effects of law relating to difference or disadvantage or authority because of what happened to him.[52] This is precisely what the theater of Grotowski and Schechner seeks of its performers and actors and spectators: to try to find ways to enable those whose bodies don't hold the memories, or the harms or the pull of recognition of injustice, is to find a way to notice when something is wrong. The purpose of performance through theater is to help to notice. Without more, it is only through the agency of the body of the lawyer, who is able to piece connections that mark injustice or a problem in the law, who notices, to find contestable nodal knots that challenge law, as enunciated as a practice of dramaturgy in order to shape and develop performance and theater,[53] to find the points that will make us notice what is outside our own experience.

To illustrate, in July 2017, a new musical, devoted to the life of a former premier of Queensland, who was behind the street march ban in Brisbane forty years earlier, opened. It was a satire, but one that tugged on those nodal knots of recognition and awareness for an audience who had no other point of reference—the new President of the United States of America. Andrew Stafford's review has deep resonances for anyone who lived through that era, and for whom a new political leader bore a striking similarity with an unknown politician from the southern hemisphere:

> For Queenslanders of a certain age, there is so much about the rise of Donald Trump that seems eerily familiar. For 19 years, his prehistoric ancestor ruled the swamps of Australia's deep north—a hillbilly dictator who beat up protesters and confounded the media with complete gibberish while a dark web of corruption flourished behind him. … These days, it's getting harder to convince people who weren't there that certain things actually happened, such as police being sent to university campuses on pre-dawn raids to rip condom-vending machines from toilet walls in 1987.[54]

p. 325 Though these events are barely known outside Australia, the musical version of the story of this particular politician has all the potential to remind and reiterate when law and its administration can go wrong, through performance. Obvious, perhaps, to those who lived through these events, but what performance can do is find ways to ask those who didn't experience events or instances where law is found wanting, to notice, and then to respond. Performance offers and enables anyone to mark these events on the body as an act of responsibility, in which the imbrication of the past is written onto the present, and the present is to be understood through the past.[55] But for law, something else has to happen, to demand a response beyond mere entertainment and to insist on creating something that can be carried forward into the body of a lawyer, and through that body, create the ability to notice, to pay attention, and respond to injustice, to be aware of law's limitations. This response is carried in the body, and the body responds first, triggering a response that involves the action of noticing; without having the ability to notice, silence prevails.

17.3 Three Modes of Training Through Performance: Shaping Response and Responsibility

With all of these images in mind, I will now turn to a basic account of performance as marked out by Schechner, through performance as theater, and as performance studies, in order to think about the possibilities for law. The motivating forces of 1968 loom large, for "any action that is framed, enacted, presented, highlighted, or displayed is a performance."[56] Performance as action, then, is not bound by place or space, by content, or by a particular or limited form of conduct. This form of action can exist anywhere. Performance is not limited by a style or character but is treated as having one or more *functions*. Schechner identifies seven of these, which may operate singly or in combination: to entertain, to create beauty, to mark or change identity, to make or foster community, to heal, to teach or persuade, and to deal with the sacred and the demonic.[57] Performance thus functions beyond the limitations of conventional images of theater: it might operate in the world at large, it might operate within the broader performative sense of everyday life and activity, but what is missing is a bare philosophical or sociological p. 326 ↳ function of performance. The kinds of actions or events that relate to these functions comprehend a wide range of events that might fall under the rubric of performance, and could comprehend and encompass

> a street demonstration or propaganda play [which] may be mostly about teaching, persuading, and convincing—but such a show also has to entertain and may foster community. … Rituals tend to have the greatest number of functions, commercial productions the fewest. A Broadway musical will entertain, but little else. The seven functions are best represented as overlapping and interacting spheres, a network.[58]

Though not considered by Schechner, these functions of performance are cognizant with a range of functions of law, from the creation of community and the action of healing to the recognition of the sacred and the rejection of the demonic. Bearing in mind that performance involves action, it is an easy step to assume that law can function in this register only if it falls into a cognate category; indeed Schechner himself thinks of law in the courtroom as performance.[59] It is, however, unhelpful to ask too much of performance, and its actions and functions, lest it might result in an overinvestment, becoming brittle and confected.[60] However, we read performance incorrectly if we think of it only as the end that it becomes, without realizing or remembering that performance has to come from somewhere. Take, for example, the street marches referred to earlier. These very visible displays of demonstration—a function for Schechner—teach, persuade, convince, to perhaps deal with or confront the demonic. In Queensland in 1977, this form of action was unlawful, and the function of the demonstrations or street marches was to precisely highlight the denial of a right to speech (unprotected as a category in Australian law), and the very real way in which power was actualized to deny this form of conduct. While this is now of the past (and a past barely remembered now, as Andrew Stafford reminds us forty years later), the only way to remind anyone that these events can be animated is to draw on one of the other functions of performance, that is, to entertain, or to create beauty, and to create community, and so on. What both versions of these events remind, however, is that law can miss or fail to notice when rights are taken away, or limited, without having any real sense that a very real harm can result.

There are three different ways that this can be made manifest. The first (in no particular order) is that this happens through the noticing body,[61] triggering recognition of the consequences of a doctrine, principle, or provision because the lawyer has experienced the same or a cognate situation; the second comes from the dramaturgically grounded nodal knots binding together a present and a past and a past with a present, as in the case of the musical just mentioned; or third, the bonds of recognition, mentioned earlier, created p. 327 through and by association, or through training. Before I move on, an Australian ↳ ultimate court decision in October 2017 offers an intervention that capstones, through protest as it happens, a unique instance through which these three instances that afford the possibility of noticing are made apparent, showing us how easily law can offer or deny justice simply through the ability or inability of lawyers or justices to notice the effects and consequences of law.

17.3.1 Another Protest

In this Australian ultimate court decision, the body as memory, the action of dramaturgy, and the forms of training (or not, as the case may be) jump to the surface of the judgments and in the antecedent events that mark them. As just mentioned, Australia has no absolute freedom of speech or expression protected in law. But twenty years after the Queensland street march bans, the ultimate appeal court in Australia, the High Court, found embedded and implied within the text of the *Commonwealth Constitution* an implied right of political communication to give electors access to information to assist them in their duty as voters. I will skip the law involved, but suffice it to say, since the right was first discovered in 1997 in the defamation case of *Lange v. Australian Broadcasting Corporation*,[62] there has been pushing and pulling at the principle ever since. Fast forward now to 2017, to this most recent case of *Brown v. Tasmania*.[63] There had been attempts since *Lange* to expand the implied right to include protests. These had been rebuffed, or had been dealt with under other areas of law, which confined the implied right to a narrow and limited field. *Brown* changed this by more or less accepting that protest was a form of speech that fell into the ambit of the implied right. In a 6–1 decision, the majority accepted that a statute in the state of Tasmania that sought to confine the activities of protests was of very wide operation and left individuals open to arrest, thus impermissibly burdening the implied right, and the statute was found to be invalid under the Constitution. The applicants had been arrested under this law in January 2016, though the charges were later dropped.

The judgments themselves have distinctive emphases and detail, and shape the law through storytelling, recollections of the history of protest, particularly in Tasmania, and of the problems with the structure of the impugned legislation. But it isn’t so much the texts of the judgment, in any obvious sense, that speaks to performance—instead it is the sense in which the judges noticed something about a law that impacted the ability to protest. Law, by and large, accounts for these kinds of ideas—rights of speech or perhaps of association—in terms that evoke fundamental liberties, freedoms, and rights. And though there was something of this in the majority judgments, it was something imperceptible that mattered to the court. It was sitting somewhere in the recounting of the law or the facts, or the history of protest in the p. 328 environmental movement, or the problems ↳ associated with broad sweep of the legislation that takes us to the unstated concern of the court. Memory is etched into the lives of the majority judges that enables them to notice, to be reminded of times and places where protest was banned, and the consequences that speak to the circumstances in this new case. As the joint judgment of the Chief Justice, Susan Kiefel, and Justices Virginia Bell and Patrick Keane notes at one point:

> the powers exercised by police officers under the Protesters Act have important *consequences for protesters and for protests generally and experience suggests* that their exercise will not always be based upon a correct appreciation of whether the land in which a protester is situated is forestry land to which the Protesters Act applies. In its practical operation, the Protesters Act may bring protest activity to an end upon the mistaken, albeit reasonable, belief of a police officer, unless the protesters are disposed to resist a direction, and thereby risk a breach of the peace, in order to test the issue.[64]

Experience matters through the pull of recognition of other protests that may, in fact, be written into the body. Virginia Bell worked at the Redfern Legal Centre, a community legal center from 1978 to 1984, and was involved in representing individuals who were arrested in protests in New South Wales, including the first Sydney Mardi Gras.[65] The Chief Justice and Justice Keane are both from Queensland and of an age where they could not but help to have remembered the protest marches of 1977—each was at the Queensland Bar at the time. Justice Gageler, whose own early life experiences brought him directly in contact with forestry industries, directly engaged with the realpolitik of the environmental protest movement:

> Most significant is the history of on-site political protests on Crown land in Tasmania, directed to bringing about legislative or regulatory change on environmental issues, beginning with the protest activity between 1981 and 1983 which preceded enactment of the *World Heritage Properties Conservation Act 1983* (Cth). The special case reveals that, since 2006, 37 protests have taken place in Tasmania in areas that have subsequently been granted legislative or regulatory environmental protection. The communicative power of on-site protests, the special case emphasises and *common experience confirms*, lies in the generation of images capable of attracting the attention of the public and of politicians to the particular area of the environment which is claimed to be threatened and sought to be protected.[66]

Justice Gageler speaks of the concept of experience in an even more pronounced fashion than the majority judgment. Justice Nettle also accounted for the history of protest,[67] while moving swiftly into the general application of the law. The older justices were receptive to arguments about the problems with the p. 329 legislation because they were able ↳ to notice, because they were aware of what can happen when protest is banned. On the other hand, Justice Gordon, who agreed with the majority, directed her attention to the abstract questions of rights and liberties in her judgment. The majority, Justices Gageler and Nettle, were all born in the 1950s; Justice Gordon was born in 1964. Like the only dissenting Justice, she was too young to have lived through these years of protest. That dissenting Justice, Justice Edelman, directed his attention to the nature of movement in and around protest sites, finding that the case was simply one of statutory interpretation, and nothing to do with the implied protection. Justice Edelman was born in 1974, and he was far too young to have experienced the impacts and consequences of protest.

17.3.2 Training

The Justices of the High Court have told us something of themselves that they perhaps didn’t realize they were giving us. Those who had seen, lived through, or were the subject of attention of laws affecting protest noticed something of the legislation that wouldn’t be immediately apparent to those Justices who hadn’t lived through, or experienced protest. Their experiences are lived through their bodies, as performance (the first possibility noted earlier), and animate the dramaturgically inspired narratives and histories that connect the past with the present, as a nodal knot of connection (the second possibility noted earlier). Each manifests the conditions of the noticing body that performance asks, and which appears in the judgments of all but the two youngest judges. And what of the third possibility noted earlier, that of training or perhaps living in and through performance? If Justice Edelman, in particular, had been immersed in the conditions of protest through performance or through cognate experiences in his own life, might he have noticed how the Tasmanian law fettered protest and speech? For just like the other members of the court, his judgment reveals that he had an image in mind of protest and protesters, but one that was radically different, and one which accepted the limitations of speech imposed by the legislature.

Training is taken as a given for actors or performers, providing the conditions that enable them to manifest a life other than their own, with all the consequences of that immersion; so too the spectator who lives performance and its effects inscribed in the body.[68] All of us experience this kind of training when we learn to drive, or learn to swim, or learn to type. Eventually, the body notices in ways that override or guide the thinking mind, becoming second nature, and shaping awareness beyond yourself once the technicalities of learning how to act or respond have become second nature. As Goodrich observes:

> Just as the soul is inscribed through the training of the body, through the institutional and
> p. 330 everyday routines that give the body affect and speech, so too the body—its ↳ attitudes, tones,
> deportment and dress—is in turn the expression of the qualities of the soul. … In the same vein, the
> body is in classical terms an image, a mode of transport between words and things, a site of
> passage that exists according to the various chimerical temporalities of memory and hope.[69]

Training is one thing, but to understand how we respond through the experiences of our own lives is another.[70] Once activated, it is easy to notice when your body responds in this way. Think about a time listening to or seeing something that annoys or irritates, or that accords with your views. Think about that ripple of irritation that shoots between your shoulder blades, that almost-impossible-to-resist turn to your neighbor for approval and acknowledgment, that grunt of recognition, your head nodding or shaking in turn. To avoid any of this, you need to consciously decide not to respond, to keep your head still, or to actively avoid the response of your body.[71] But what you respond to and what you notice is not necessarily going to be shared. The tingle of recognition, or annoyance, or response depends on who you are. Remember that it isn’t just your mind responding but your body, first and foremost triggering the response in your thinking and reasoning mind.[72] There is a result here that is unpalatable for law, for these responses exist *before* the activation of law and its doctrines and principles, and there is a deployment of factors beyond or outside the limits of law as a conscious or unconscious part of the process of activating law. This is taken as a given through the panoply of critical responses to law, but unacknowledged and unwelcome within the positivist presumptions of law as a doctrinal practice. As Goodrich notes, “[I]n a stronger sense the ‘micro-physics’ or infinite particularity of law applying acts both give effect to and endeavour in turn to effectuate an institution of life, a constitution and manners, civility and justice that far exceed the bounds or knowledges of law.”[73]

Through training, or acknowledgment of who we are, or the dramaturgically grounded nodal knot, we can begin to notice at least three tools, grounded in performance, that offer possibilities and techniques to enliven and make manifest instances when law might give effect to conditions of injustice, in the broadest ways possible. Grotowski told actors that they needed to ground within themselves the history, literature,

p. 331 and life of a place in order to train themselves, as well as the physical training he imposed on his ↳ actors and his most famous practice, that of the *via negativa*, the stripping of blocks in order to work with the deepest core of the self to then move forward.

We find a cognate kind of training in law in unexpected places. From Peter Goodrich's work to Jack Sammons's theologically grounded engagements in the response and responsibilities of lawyers through music or play, where he asks us and wants from us a recognition that there is something for us to know beyond ourselves in order to do our job properly—through the practice of *via negativa* (as theology).[74] Through both Goodrich and Connal Parsley,[75] we receive the possibilities of a Ciceronian and Stoic formation, and so too the interventions of the Dutch judge and legal theorist Jeanne Gaakeer.[76] We see a grounding in training and conduct through jurisography, as shaped by Ann Genovese, Shaun McVeigh, and Peter Rush: "to take care of ... and to understand how the fragmentary sources and forms of jurisprudence that people live with everyday (the official, and the unofficial) condition and contour the conduct of their lawful relations."[77] We find the demands of this training in the work of Zenon Bańkowski,[78] and through the performance practice created by Maks Del Mar, and his adoption of a Buberian Ich and Du[79] (that Buber had influenced Grotowski also is telling). Their approach toward training is animated at least in part as a demand of physical practice, grounded in performance training. These practices are designed to create both self-awareness and recognition beyond the self. So through Gillian Calder,[80] deploying performance and theater training through the legislative theater practices of Augusto Boal,[81] law students are asked to acknowledge the possibilities of engagement with text and the self, through the use of performance training and workshopping as an enacted practice of law.

The idea of an improvisation of law, through music produces a training that can deploy what's needed to
p. 332 move into the thing in law that is unknown grounded in the work of ↳ Desmond Manderson,[82] and Sara Ramshaw.[83] There are other practices too, from James Parker's insistence on listening,[84] and Olivia Barr's careful practices of walking,[85] and Andreas Philippopoulos-Mihalopoulos' responsive spatial practices.[86] In short, though little of this is styled directly as performance or theater in any particularized sense, the practices, conduct, and concern of these scholars draw, implicitly or explicitly, on forms of training in performance as a practice of theater.[87]

What performance represents is a shift from dogma and doctrine to obligation, commitment, awareness, responsibility, and change as a *practice*. From a theater space into everyday life, this notion of performance challenges expectations and norms, and requires something of the self (actor/performer and audience member), voluntarily or otherwise, prodding through the encounter that demands an active and aware form of being, that challenges, bodily, the self and unexamined life, dogmas, and doctrines. Performance, in this sense, is a practice and an ethic, and reveals itself as having the potential to function as a jurisprudence of response and responsibility, through the techniques that performance imbues in the self.

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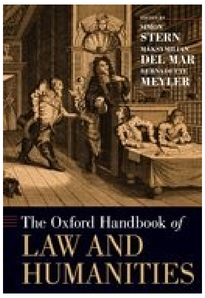

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CHAPTER

18 Accident

Daniel Williams

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Abstract

This chapter explores some legal and literary ramifications of “accident” in British law and society from the late eighteenth through the early twentieth century. This period saw changes in common law and legislation relating to accidents, including the emergence of negligence as a distinct tort and statutory provisions for employer liability and workplace compensation. The chapter turns on the institution of the deodand, a common-law rule that allowed inquest juries to assess liability for accidental deaths caused by non-humans. After such entities began to include industrial machines, the deodand was abolished by Parliament in 1846. Examining legal-historical cases and norms alongside literary-cultural representations, the chapter claims that the deodand’s disappearance, and concurrent transition to fault liability regimes, marked a loss in the understanding of accident. If the nineteenth-century emergence of modern accident law tended to simplify accidents into surrogates for human interaction, the deodand qua institution grasped how reckoning with accidents demands an alertness to human entanglement with non-human causality. Literary representations of vehicular accidents afford a glimpse of what was coming to be lost in this changing legal-cultural dispensation. From Thomas De Quincey to Thomas Hardy to E. M. Forster, the complex non-human, material, and affective dimensions of accident dissipate into the background, where they continue to supply narrative and formal motivation even as they leave human obligations and institutions in the light.

Keywords: British literature, accident law, negligence, liability, deodand, non-human, affect, Thomas De Quincey, Thomas Hardy, E. M. Forster

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ACCIDENTS befall us, eluding our attempts to navigate the world with foresight, reason, or care and offering instead the sudden collision with unpredictable agencies, heedless of our concerns. Law tends to be wary of accident, segmenting unruly events into rules, standards, and categories while consigning what it cannot explain to the realm of “mere” or “pure” accident. Literature, by contrast, can be alert to accident’s potential for revealing shades of agency and affect that are less straightforward, more formally compelling, than determinations of liability or fault. In what follows, I explore some legal and literary ramifications of “accident,” understanding this term in the context of changing ideas about civil liability rather than in its related sense as an extenuating category in criminal law.

For British law and society from the late eighteenth through the early twentieth century, “accident” was a category in flux.[1] As risky industrial occupations and rapid modes of transport brought concerns about public safety, especially in crowded urban areas, changes in both common law and legislation attempted to manage escalating cases of accidental injury and death. This period witnessed the crucial emergence of negligence as a distinct tort, alongside statutory provisions for employer liability and accident compensation in the workplace and beyond. On one side of Victoria’s reign, roughly speaking, accidental injury and death formed occasional episodes in the rhythm of working life and tragic outcomes were borne, however inadequately, by local support systems like the family or parish. On the other, the ravages of modern misadventure were referred to a convoluted system of legal actions for (and hedges against) individual negligence and employer liability, shaped in no small part by the compensation schemes of a growing insurance industry.

At the end of the nineteenth century, jurists reflecting on the historical development of liability could see a trend from supposedly backward ways of thinking about civil wrongs to the enlightened space of tort law, p. 336 which received its first stand-alone treatments in ↳ this period.[2] Amid these social developments and legal innovations, a curious institution of common law was made to disappear. From the Middle Ages through the mid-nineteenth century, non-human animals or objects that accidentally caused the death of a human could be declared “deodand”—“givable to God.” Offending entities—horses and oxen, boats and carts, mill wheels and hayricks, cauldrons and pits, tree branches and church bells—would be forfeited to the crown or, in what quickly became the typical scenario, assessed a fine payable by their owners.[3] In 1846, after such entities began to include steam boilers and railway engines, the deodand was abolished by Parliament and replaced by liability regimes apparently more attuned to a machine-driven, accident-prone industrial society. Accidental deaths were no longer compensable through coroners’ courts and the deodand’s possibility of monetary relief. One relied instead on the costly and indirect route of civil suits and claims in insurance, the period’s “new social authority on death.”[4]

The instrument of the deodand makes visible how accidents can emerge from an extraneous non-human world with which humans are entangled and over which our control sometimes lapses. Accidents are often used as a cover for human duties enshrined in such a world—deflected onto animals, vehicles, tools, or machines. I propose, to the contrary, that we can furnish suppler accounts of the responsibilities entailed in cases of accidental injury and death by attending to such entities as more than fungible bearers of human value or concern. Examining legal-historical cases and norms alongside literary-cultural representations, I argue that the disappearance of the deodand, and concurrent transition to fault liability regimes, actually marked a loss in the understanding of accident, particularly its affective entailments and object dimensions.

In section 18.1, I give a synopsis of the deodand’s medieval origins, industrial-era heyday, and sudden demise. I claim that the nineteenth-century emergence of what could be seen as the modern law of accident —standards to assess liability (fault or otherwise) and mechanisms for compensation—tended to simplify accidents into surrogates for exclusively human interaction. What the institution of the deodand grasped, and what such standards started to disband, was how reckoning with accidents demands an alertness to our entanglement with non-human causality. It requires seeing material objects as “legal actants” rather than simply transposing events into human rubrics of intention, liability, or fault.[5] It necessitates an openness to p. 337 the affective energies and expiatory ↳ desires that also fall out of accidents, and not only to solutions that end by assigning (or abjuring) blame and awarding pecuniary compensation. In section 18.2, I suggest that literature might reveal what is at stake in these divergent ways of accounting for accident. In three examples coterminous with the legal developments, literary representations of vehicular accidents afford a glimpse of what was coming to be lost in a changing legal-cultural dispensation. From Thomas De Quincey's "The English Mail-Coach" (1849) to Thomas Hardy's *Tess of the d'Urbervilles* (1891) and E. M. Forster's *Howards End* (1910), the complex non-human, material, and affective dimensions of accident dissipate into the background, where they continue to supply narrative and formal motivation even as they leave human obligations and institutions in the light.

18.1 Accidents at Law: Medieval Devices to Industrial Tools

Legal provisions for assigning liability to animals and objects can be found in classical and biblical texts. These include standards governing the "goring ox" that injures or kills other animals or humans, found in Hebrew scriptures and roughly similar Mesopotamian codes; Greek rites that took place at the Prytaneion, where inanimate objects were called to account for their crimes; and the Roman law practice of forfeiting a harmful object in what was known as "noxal surrender" (*noxae deditio*).[6] In European societies from the Middle Ages until as late as the nineteenth century, juridical and ecclesiastical proceedings against or involving animals fulfilled a range of social functions.[7] The institution of the deodand shares elements with these traditions.

The deodand's essential mechanism is that an object or animal is held liable when it causes the death of a human being.[8] If movement was typically required, according to a formula characterizing that which "moves to the death" (*omnia quae movent ad mortem*), there are nevertheless cases in which a stationary p. 338 object could count: a falling ↳ branch and falling out of a tree might both, in principle, elicit the deodand.[9] Further, a distinction (perhaps adumbrating commercial needs) was observed between freely moving objects and fixtures: a wheel or door might be deodand, but not usually the attached vehicle or building or its contents or merchandise. If the early law appeared to mandate the actual confiscation of the offending non-human, later a monetary penalty sufficed, a fine proportional to the entity's value levied by the crown or its local representatives.

"Any culture," reasons the anthropologist William Pietz, "must establish some procedure of compensation, expiation, or punishment to settle the debt created by unintended human deaths whose direct cause is not a morally accountable person, but a non-human material object."[10] Yet the deodand, at least in its medieval origins, seems to have kept two such functions distinct: the expiatory (or psychological) and the retaliatory (or compensatory).[11] The deodand was an efficient way to assign a cause of death, deflect blame, seek atonement, and assuage guilt. It worked as "a means of explaining away and justifying events" in the face of superstition and moral confusion, and perhaps also of banishing malevolent spirits that might be thought to reside in animals or objects.[12] Yet the medieval deodand also converted a desire for retaliation into compensation, sometimes directly for families of accidental death victims, even if it thence "gradually developed into pure forfeiture."[13] As a mode of converting accident into order, the deodand displaced responsibility into object causality (as if making humans vicariously liable for their animals or objects without necessarily appealing to a concept of fault) and thereby restored social norms. As an "early form of liability for death," it could be strategically deployed to avoid or mitigate felony (homicide) charges.[14]

In the 1830s, this obscure common-law notion came to be wielded as a compensatory device of wide, controversial, and finally self-defeating application.[15] Given industrialized workspaces and mechanized modes of transport, the objects that might "move to the death" were rapidly becoming greater in size, number, and hazard. There were more occasions to die, in the coroner's formula, "accidentally, casually, and by misfortune."[16] The scope for accidental death having expanded along with the money value of the p. 339 dangerous entities, attributions of fault became at once unavoidable and hard to discern: ↳ "we have surrounded ourselves with lethal engines," wrote Frederic Maitland, "so that one careless act may slay its thousands" without any obvious perpetrator.[17] In response, courts led by "activist coroners" in some areas of Britain started to use the deodand to combat lax safety provisions.[18] For accidental deaths on roads, railways, and steamships, and occasionally in factories and mines, inquest juries “began to levy deodands in a more sophisticated manner—to indicate quite specifically the ‘sense of the misconduct’ of a negligent party to an accident.”[19]

In this updated usage, the combined function of retaliation and compensation clearly gained traction, in line with the growing prominence of fault by the late eighteenth century.[20] What might have functioned in earlier periods as a deflection of possible human fault into a non-human sequence of causal (and so, in some sense, strict) liability was now used more openly to hold individuals responsible, often at great remove, for high-speed vehicles and machines. More proximately, the deodand could at the same time still be deployed as “a less severe alternative to manslaughter verdicts,” which might have been warranted in the frequent industrial episodes of grievous injury and fatality.[21] The compensatory dimension enabled deodands to operate, albeit unevenly, “both as chastisement and inducement to greater caution”—exacting fines from modern industry while exhorting its captains “to exhibit greater humanity toward workers.”[22] Using the deodand to stipulate “standards of care,” with monetary values sometimes tailored to a specific “degree of negligence,” coroners and their juries were providing a sort of ad hoc action in tort, a bootstrapped remedy when the “law afforded almost no other means of relief for the victims of workplace accidents and their families.”[23]

In 1830, an accident on the inaugural trip of the Liverpool and Manchester line ushered in the publicity eventually to result in the deodand’s downfall, although the inquest jury did not levy a fine in this case. The accident involved the death of William Huskisson, a member of Parliament in whom the first number of *The Economist* recalled “an ardent, warm, and able echo” of Adam Smith, a free-trade visionary who “saw that our interests and commerce had far out-grown the narrow limits which ignorant legislation had assigned them.”[24] As deodands levied against railway engines in the 1830s and 1840s climbed into thousands of pounds, it is thus unsurprising to find a backlash from the legal and political establishment against such arbitrary overreach. Higher courts dismissed the verdicts of inquest juries, often on technicalities, and railway companies and industrialists exerted pressure on Parliament to banish the deodand.[25] “Coroners’ courts,” Elizabeth Cawthon writes, “had grown too vehement in their denunciation of employers’ callousness, too prominent in the public’s view, […] and too reluctant to depend on the civil process to deal with the problem of occupational accidents.”[26] Enacted in the same session as the Abolition of Deodands Act, the Fatal Accidents Act (1846) became the standard for that process.[27] It required the expense of bringing a civil suit and the burden of proving liability, and it allocated compensation in proportion to one’s pre-accident means, preserving the socioeconomic status quo.[28] If families of workers or third-class railway passengers were unlikely to afford or benefit from such remedies, relations of Huskisson’s ilk stood to collect hefty awards.[29]

In its sudden recrudescence and swift demise, the deodand sits at the fulcrum of other developments that adjusted the law of accident for a crowded urban world, where acting without reasonable foresight had a higher likelihood of causing damage. The mid-nineteenth century gave rise to “legal structures better suited to capitalist enterprise and liberal society,” including the use of insurance to delineate accidental liability in advance and the “institutional production of a new kind of (legally) immoral person: the modern limited liability corporation.”[30] It was thus by means of a rapprochement between legal innovation and liberal-economic ideology that Victorian Britain attempted to manage accidents that occurred overwhelmingly on capitalist premises and conveyances—to ensure the safety and, failing that, the modest pecuniary compensation of those on whose “lives and limbs” it depended for the production of profit.

At common law, these structures included negligence, which during the nineteenth century acquired its characteristic features as an independent tort—namely, the “duty of care” concept and the “reasonable man” standard—and was soon applied in cases of workplace injury and fatality.[31] Certain liabilities akin to negligence had been familiar well before the nineteenth century: the strict liability of innkeepers and so-called common carriers (of goods or people); the vicarious liability of employers "for the inattentive acts p. 341 their servants committed against third parties in the ordinary course of employment."[32] ↳ Wider applications now became visible with the first case of a worker suing his employer (unsuccessfully) for injury caused by the negligence of another worker, *Priestley v. Fowler* (1837).[33] Yet novel actions for workplace negligence were almost immediately eroded or compromised by a trifecta of legal defenses: contributory negligence (which made less actionable any accidental harm brought about partly through a victim's own fault); the doctrine of common employment (which deprived workers injured by the negligence of other workers, including supervisors and subcontractors, from any action against the employer they shared); and *volenti non fit injuria* (which held work contracts to include an implicit "assumption of risk," priced into wages, for other workers' negligence).[34] In some cases these doctrines lasted until the mid-twentieth century.[35] They tended to shield employers and adhered to prevailing liberal-economic ideas.[36] If the courts saw their "new society in its dangerous world" as "willing to compromise safety for economic advantage, […] negligence afforded the means whereby concessions could be made."[37] It is hardly accidental that these principles were honed through cases—*Hutchinson v. York, Newcastle & Berwick Railway* (1850) and *Wigmore v. Jay* (1850)—brought under the Fatal Accidents Act, whose author was the son-in-law of the judge who blocked the initial workplace negligence case.[38]

On the statutory side, the slow acknowledgment that Victorian society had to reckon with the problem of accidents—first visible in debates about the Factory Acts—eventually produced legislation hedged with qualifications favoring industrial employers and financial institutions like insurance. With the Fatal Accidents Act, "reform of the law was dominated by parliamentarians' fear that employers might find themselves liable for very large compensation bills," and "both judges and MPs failed to take into account how far poverty and other social factors […] constrained people to take dangerous jobs."[39] The later legislative measures—the Employer's Liability Act (1880) and more significant Workmen's Compensation Acts (1897, 1906)—have been taken to foreshadow Britain's twentieth-century welfare state, but despite p. 342 the trend toward viewing workplace ↳ accidents in terms of strict liability, these statutes nonetheless included many concessions to political economy.[40] Whatever the subsequent differences in characterizing vehicular and industrial accidents, the nineteenth-century legal narrative thus leads in the direction of a system of liability and compensation adherent to a "fault principle" that has been the target of critique ever since, most trenchantly in Patrick Atiyah's frequently updated *Accidents, Compensation, and the Law* (1970).[41]

But what happened to the expiatory and psychological aspects of reckoning with accidents? By the late nineteenth century, the legal personification or animation of the non-human world was acknowledged only as a vestigial impulse to be superseded by wise legislation. Adopting the survivalist dogmas of late Victorian anthropology, jurists writing about the law's historical development saw the vengeful dimensions of early liability as "primitive," the impulse to (fault-based) compensation as "civilized."[42] Maitland describes the deodand as a residue of "a sacral element which Christianity could not wholly suppress," its survival into the nineteenth century wryly chalked up to "that unreasoning instinct that impels the civilized man to kick, or by voice consign to eternal perdition, the chair over which he has stumbled."[43] Oliver Wendell Holmes argues that legal standards responsive to the "customs, beliefs, or needs of a primitive time" persist for reasons of expediency, acquiring a new rationale or "ground of policy."[44] However sensible the resulting promotion of a "mean" between "absolute liability for all harm done, and liability only for harm that is both done and intended," these legal genealogies characterize harm principally on a spectrum of fault.[45] In the nineteenth-century judicial setting, this meant silencing modes of emotional adjudication for which accidents cry out, blocking off narrative or affective avenues for expiation, and precluding recognition or compensation (called *solatium*) for merely non-pecuniary losses ("injured feelings").[46]

Victorian periodical and journalistic discourses, where accident reporting was rife, were more open to the affective charge of accidents and often deployed animistic language to represent the non-human causes of death across Britain.[47] Once such events were no longer remediable by the deodand provision, however, a

p. 343 more common response became an objectless affect like shock or melancholy (both frequent Victorian ↳ epithets for accidents) without any subsequent inquiry.[48] In the 1850s, Charles Dickens's *Household Words* carried a regular "Narrative of Accident and Disaster," less a narrative than a synopsis of catastrophes that addressed mine, factory, or railway proprietors with weak meliorist formulas: issuing admonitions for "want of proper caution"; exhorting employers to "make provision for the widow and family of the deceased"; voicing "surprise and regret that so little care and attention is paid to the safety of persons."[49] In a companion series about preventable accidents, Henry Morley describes casualties in horrifying detail and sarcastically praises "the results of the administrative kindness so abundant in this country," where working deaths are "a sacrifice to […] commercial prosperity" and "accounts [are] squared with society by a matter-of-fact verdict: 'Accidental death.' "[50] While castigating owners for not following the rules established by the Factory Acts for unfenced machinery, Morley seems unaware of legal shifts that were making accidents more fundamentally non-remediable.

Finally, novels where notable mishaps occur, although legible as productive sites for understanding accident and its ideological significance in Victorian society and print culture, generally limit narrative draw to the catastrophic scene. Dickens's *Dombey and Son* (1846–1848) (which began serialization a month after the deodand's abolition) and *Hard Times* (1854); Elizabeth Gaskell's *Mary Barton* (1848), *Cranford* (1851–1853), and *North and South* (1854–1855); Anthony Trollope's *The Prime Minister* (1876)—all bear insight into industrial or railway accidents while affording scant attention to the environing legal processes, in contrast to their more sensational cases of one character's direct or intentional culpability for another's death.[51] In the next section, I consider literary instances that make more sustained use of accident, rendering visible the affective and non-human aspects that the modern legal dispensation slowly moved out of sight.[52]

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18.2 Literary Accidents: Coach, Cart, Car

De Quincey's "The English Mail-Coach" muses on the vanished world of coach travel during the Napoleonic Wars while laboriously describing the events leading up to a "sudden death."[53] In his nostalgia for the days of the mail against the encroaching railways, De Quincey also hearkens back, I argue, to a prior legal dispensation that dealt more frankly with the entanglements of accident. He braids together the deodand's conjunction of legal remedy and object causality and diffuses responsibility among human and non-human actors, or what he suggestively terms "inter-agencies."[54]

De Quincey had a desultory engagement with the legal profession. He saturates this text with jargon, citing recent statutes and Roman law, bantering about capital punishment, and characterizing mundane features of coach travel—especially the fractious relations between inside and outside passengers—according to rubrics of national sedition and international conflict. Further, De Quincey compasses an array of legal topics touching on the relationship between the state and its subjects. Often, he treats these matters satirically. A sailor "making light of the law" sits at the back smoking a pipe and almost sets the mail coach aflame: "it was treason, it was *laesa majestas*, it was by tendency arson."[55] At other moments, the reach of juridical power is cast in darker terms. The mail coach, De Quincey surmises, demands reverence because the "exact legal limits" of its power are "imperfectly ascertained."[56] "Treason they feel to be their crime," he notes of those blocking its path: "each individual carter feels himself under the ban of confiscation and attainder [†] and nothing is wanting but the headsman and his axe, the block and the sawdust, to close up the vista of his horrors."[57] This rhetoric, both comical and chilling, affords an excuse for the mail coach's path of casual destruction. "Huge was the affliction and dismay, awful was the smash" when the mail accidentally toppled other vehicles, but such costs will be covered, De Quincey assumes, by local jurisdictions, "levied upon the hundred."[58] Acting as an advocate on behalf of state power and communicative efficiency, he steps in "to represent the conscience and moral sensibilities of the mail": "Tied to post-office time […] could the royal mail […] be expected to provide tears for the accidents of the road? If even it seemed to trample on humanity, it did so, I contended, in discharge of its own more peremptory duties."[59]

A legal characterization of the mail coach system and its provisions, statutes, and uncodified protections dovetails with an advance justification of the accidents it causes. Various legal allusions thus frame De Quincey's reference to the deodand—a sardonic fantasy about his own unremarked death, contrasted with that of an upper-class insider:

> p. 345 this other creature, in the case of dropping out of the coach, will enjoy a coroner's inquest; consequently he will enjoy an epitaph. … "Died through the visitation of intense stupidity, by impinging on a moonlight night against the off hind wheel of the Glasgow mail! Deodand upon the said wheel—two-pence." What a simple lapidary inscription! Nobody much in the wrong but an off-wheel.[60]

Mocking the coroner's formula for accidents caused "by the visitation of God" while adverting to a legal remedy for accidental death that had vanished along with his beloved mail, De Quincey could actually be describing the differential compensation that obtained under the Fatal Accidents Act, where the insider would be likelier to receive a lump sum.

With this gesture toward the deodand, De Quincey opens another, more serious dimension of "The English Mail-Coach": its attention to the dispersal of agency and liability across human and non-human entities, underlined in the extended contrast between mail and rail. The former is celebrated for conveying the sensation of movement in a way that registers as a sympathetic conjunction of human passenger and non-human carrier, the latter disdained as an inert vehicle: a "vital experience of the glad animal sensibilities" against "the product of blind insensate agencies, that had no sympathy to give."[61] The mail's vitalism, in contrast to the railway's mechanism, enables a living network of coaches emanating from London, carrying the agencies and "heart of man" through and into the "electric sensibility of the horse."[62] By the same token, the passengers are reified: insiders are "a porcelain variety of the human race"; outsiders mere "delf ware"; the driver a "bronze equestrian statue."[63]

In keeping with this vitalism of objects, the accident scene abridges human agency even as it spotlights legal concerns—an interlocking sequence of responsibilities, duties to warn, and degrees of negligence—in ways that make the setting itself complicit. De Quincey finds himself at the helm, his one-eyed coachman fast asleep with the reins wedged between his legs, as they bear down on the "human freightage" of a smaller gig occupied by young lovers.[64] "What made this negligence less criminal than else it must have been thought," De Quincey explains as if already putting the case before a court, "was the condition of the roads at night during the assizes."[65] The legal system of traveling assizes is the reason for both the empty roads and the fatigue of the coachman, who dozes because his days are taken up with "an interest at stake in a suit-at-law pending at Lancaster."[66] The object world sets the conditions for an accident by conspiring through the different qualities of the road—"soft-beaten sand," "paved centre"—to drift both vehicles to the same side.[67] Thus "the stage where the collision must be accomplished" is a legal space, with "parties that seemed summoned to the trial."[68]

After the mail coach careens past, De Quincey asks us to imagine "the elements of the case," again in the manipulative rhetoric of the advocate: "suffer me to recal before your mind the circumstances of the
p. 346 unparalleled situation."[69] The earlier riff on the deodand ↳ turns out to be proleptic of the accident's climax: "we had struck the off-wheel of the little gig."[70] Although the wheel is the object damaged rather than the cause of death, the parallel underlines how De Quincey deals with legal responsibility through the oblique means of object "inter-agencies." Human casualty is only gradually and ambiguously disclosed: we see first the horse; then the gig that, "as if it sympathized with human horror, was all alive with tremblings and shiverings"; next the young man who "sat like a rock" and "stirred not at all"; and finally the young

woman, flailing and distraught, on the verge of death.[71] The human negligence occasioning these events slips out of sight as quickly as the scene, its victim converted from tangible reality to the intangible future of De Quincey’s “dreams.”

“The English Mail-Coach” has often been read as peddling nostalgia: for national unity and wartime patriotism, as against an atomized Victorian political public; for more grounded modes of transport, as against “the new system of travelling, [where] iron tubes and boilers have disconnected man’s heart from the ministers of his locomotion.”[72] Further, it has been taken to dramatize the midcentury reforms that consolidated the Post Office as an agent of British imperial and commercial progress, centralizing delivery networks through London, curtailing potentially seditious or “incendiary” networks of private correspondence, and enabling the institution to offer “personal financial services, including public welfare distribution, life insurance and a savings bank.”[73] Along similar lines, we might detect in De Quincey an equally prominent legal nostalgia. In light of the Fatal Accidents Act, “The English Mail-Coach” remembers a regime open to the affective entailments and object entanglements of accidental death—a regime that disappeared with an industrial (specifically railway) capitalism predicated not only on speed but on devaluing the human cost of unceasing velocity. The “glory of motion” is haunted by death, in the missives announcing tolls from the battlefields of Europe and in the representative casualty at the narrative’s heart.[74] The whimsical reference to the deodand could be read as resigned to a world where such charges can no longer be levied against objects that “move to the death,” especially when they are vectors of the imperial nation and its high-speed commercial networks.

The normative shift under way at the time of De Quincey’s text can be brought into focus by comparison to later fictional accidents that take place in a changed legal world. In Hardy’s *Tess of the d’Urbervilles*, the culprit is not the glorious mail coach but the lowlier mail cart, which participates in the first devastating event of the protagonist’s story. Despite Hardy’s broader fascination with cultural “survivals” and quasi-animate objects, the deodand’s psychological possibilities—expiation and the restoration of order—are all but forgotten here, leaving human fault as the principal domain of explanation for accident.

p. 347 The object elements in this scene are initially akin to De Quincey’s descriptions. Tess Durbeyfield is in charge of a “rickety little waggon,” driven by a horse named Prince, “only a degree less rickety.”[75] As her brother dozes, she takes the reins and drifts into a reverie wherein the “mute procession past her shoulders of trees and hedges became attached to fantastic scenes outside reality.”[76] She is awoken by a “sudden jerk” revealing that their “harness was entangled with an object which blocked the way.”[77] “The morning mail-cart,” Hardy writes, “with its two noiseless wheels, speeding along these lanes like an arrow, […] had driven into her slow and unlighted equipage. The pointed shaft of the cart had entered the breast of the unhappy Prince like a sword, and from the wound his life’s blood was spouting in a stream, and falling with a hiss into the road.”[78] In the gathering light around the accident, the surrounding objects are most vivid: “The atmosphere turned pale, the birds shook themselves in the hedges, arose, and twittered; the lane showed all its white features, and Tess showed hers, still whiter. The huge pool of blood in front of her was already assuming the iridescence of coagulation.”[79]

Yet the non-human world simply stands as witness; responsibility can only inhere in the human parties to the scene. “ ‘You was on the wrong side,’ ” is the coachman’s matter-of-fact accusation: “ ‘I am bound to go on with the mail-bags, so that the best thing for you to do is bide here with your load. I’ll send somebody to help you as soon as I can.’ ”[80] This sequence of duties and requirements is as entirely human as the affective charge that follows: “ ‘’Tis all my doing—all mine!’ the girl cried, gazing at the spectacle. ‘No excuse for me—none.’ ”[81] The “self-reproach which [Tess] continued to heap upon herself for her negligence” severs the potential legal domain of this event from its object ensemble.[82] To be sure, deodand could never have applied here (the death is not human). It is intriguing nonetheless that the event involves a disavowal of the fetishism that underwrote this long-standing instrument of common law.[83] Instead of responsible objects converted into monetary fines to deflect the possibility of human guilt, a faultless animal receives an honorable burial and is not sold for a pittance to the knacker's yard. When Prince is buried near the Durbeyfield home, Tess continues to feel "as though she regarded herself in the light of a murderess," accentuating the sense of human fault.[84]

p. 348 It is not too much to say that a lack of object displacement for this early event dictates the rest of the plot. Assuming the mantle of a guilt that cannot be assuaged by fine or forfeiture, Tess tells Alec d'Urberville that she "killed" the horse and confesses the need to do something "on account of it."[85] After this first visit with her future assailant she poignantly fields questions from her family while walking near Prince's grave. Henceforth she accedes to the type of aversive timidity that could be held more at fault than the negligence it would avoid.[86] "Ever since the accident with her father's horse," Hardy writes, "courageous as she naturally was, [Tess] had been exceedingly timid on wheels," and with Alec she "began to get uneasy at a certain recklessness in her conductor's driving."[87] The shared vehicular theme suggests that a drama of human accountability must follow from the earlier inability to deal with non-human casualty.

In Forster's *Howards End*, finally, the sociotechnological shifts alluded to in De Quincey and Hardy have fully arrived. With the "craze for motion," one flies everywhere in "the motor" and thinks nothing of taking the train from London to forestall an ill-advised flirtation in the countryside.[88] If Forster's novel addresses the "chance collisions of human beings," its serendipitous plots and relationships are nevertheless marked by accidents that confirm how legal dispensations have entirely circumscribed the aleatory and the non-human, marking a melancholy separation between human institutions of legal and financial liability and the concrete world.[89]

The novel's first "motor smash" is not witnessed but reported when Henry Wilcox, coincidentally happening upon his wife and her new acquaintance Margaret Schlegel at King's Cross, assures them that he and their daughter are fine:

> "So are we and so was our car, which ran A1 as far as Ripon, but there a wretched horse and cart which a fool of a driver—" [...]
>
> "I was saying that this fool of a driver, as the policeman himself admits—" [...]
>
> "—But as we're insured against third party risks, it won't so much matter—"[90]

The breathless fragments of Henry's account focus, as in Hardy, on aspects of human liability; the non-human elements are merely insignificant components in the legal ledger. A year after legal decisions adopted fault rather than strict liability for motor vehicle accidents in 1909, Forster's scene hovers between intimating fault and retreating to insurance, which dampens both consequence and affect.[91] A later accident p. 349 likewise ↳ screens the human from the non-human. On a drive through the countryside near Oniton, one of the cars suddenly halts. As the women are ushered into another vehicle and driven away, Charles Wilcox's blithe comment—"It's all right. Your car just touched a dog"—muffles the details of the casualty (actually they killed a cat).[92] Again, legal and monetary norms are expected to simplify matters, to forestall fault:

> "I expect a little of"—Mrs. Warrington scratched her palm—"will be more to the point than one of us!"
>
> "The insurance company will see to that," remarked Charles.[93]

Even Margaret's horror at these arrangements—"Ladies sheltering behind men, men sheltering behind servants—the whole system's wrong"—hardly restores concreteness to the accident, and she is left with a vague sentiment that "the girl whose cat had been killed had lived more deeply than they."[94]

Forster juxtaposes the first accident, across a chapter break, with the "rapid death" of Ruth Wilcox: an insurable, inconsequential accident set against a momentous, irreparable loss.[95] Accident, though the word never appears in *Howards End*, threads these plots together. The word “smash” marks domestic mishaps like breaking a picture frame, the mistakenly predicted collapse of the Porphyrion fire insurance firm, and the eventual ruin of the lower-class Basts.[96] More generally, these accidents might be taken to highlight wider thematic contrasts. On one hand, we have the Wilcoxes, with their brusque classism and belief in the inalienable rights of capital and property, who trust in “that ‘bit of luck’ by which all successes and failures are explained” even as they hedge against misfortune through novel instruments like liability insurance, siding with “national morality” in “assum[ing] that preparation against danger is in itself a good, and that men, like nations, are the better for staggering through life fully armed.”[97] On the other, the Schlegels, with their sentimental paternalism and discomfort about the sources of their wealth and leisure, who defend the virtues of unpreparedness in the face of “all the emergencies of life” even as they are acutely aware that “there’s never any great risk as long as you have money,” which “pads the edges of things” and allows certain people to “stand […] as upon islands.”[98] From a financial base made comfortable by Consols and similar investments, they see themselves as lodging “a protest against the inner darkness in high places that comes with a commercial age.”[99]

Yet if the law of accident provides a schema for the contest between the Wilcoxes’ isolating, unromantic commercialism and the Schlegels’ “Only connect!” ethos, it does so by shielding both from a mysterious non-human realm.[100] In the novel’s climax, the accidental death of Leonard Bast at Howards End, the object background plays a symbolic part: Leonard “entered a garden, steadied himself against a motor-car that he found in it, found a door open and entered a house,” encountering there “a man whom ↳ p. 350 he had never seen”: “A stick, very bright, descended. It hurt him, not where it descended, but in the heart. Books fell over him in a shower. Nothing had sense.”[101] The sequence of indefinite articles that appear to flatten object and human actors, however, immediately gives way to human activities and ascriptions of fault: “murder’s enough,” comments a servant, presaging the eventual inquest verdict in this case, “manslaughter.”[102] This event fulfills an earlier thought of Mr. Wilcox’s, that Leonard “must pay heavily for his misconduct” in seducing Helen Schlegel.[103] So although “it did not seem to [Charles] that he had used violence” and “[i]t was against all reason that he should be punished,” “the law, being made in his image, sentenced him to three years’ imprisonment.”[104] His image is that of a fault-based system that converts all manner of social infractions into grounds for retaliation and compensation but not expiation, seeing human terms (financial or carceral) where the law once, however inchoately, captured affective and non-human interactions. “It is those that cannot connect who hasten to cast the first stone.”[105]

18.3 Conclusion

A sea change in Victorian legal conventions thus left its mark, however elliptically, in literary-cultural representations. What might be characterized as a victory for assigning responsibility to persons (human or corporate), for restoring social order through systems of fault-based liability and insurance, is also conceivably a loss of intimacy and complexity, a simplification that omits the intermingled agencies of humans and non-humans in any given accidental constellation—a loss of the sense of loss. De Quincey treats accidental death as an occasion for melancholy, displacing the occasions of loss into reverie. Hardy makes his heroine experience calamity in solitary fashion, the birth of a short-lived child named Sorrow a fitting symbol for Tess's tragic inability to grapple with accident. Forster's characters are not quite sure what they are missing even as the laws of accident pattern their experiences. Accidents in this period, in life as in literature, elicited aesthetic or generic responses—prominently what has been called the "catastrophic picturesque"—even as legal or procedural consequences ran aground.[106] People grappled with human tragedies, as we still do, precisely in the calculative terms that modern insurance and accident law encourage: someone at fault would "pay"; somehow the loss would be "accounted for." "It is impossible to see life steadily and see it whole," writes Forster.[107] If *steadily* is how the modern legal-financial dispensation aims to characterize accident, are there ways to see it *whole* again, to maintain the connections among agency and liability, grief and remorse, which since ancient times have been worked out in the terms of our unpredictable entanglements with animals and things?

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Notes

1 For work on parallel developments in nineteenth- and twentieth-century America, see "Further Reading."

2 In England, C. G. Addison, *Wrongs and Their Remedies* (London: V. & R. Stevens, 1860); in America, Francis Hilliard, *The Law of Torts* (Boston: Little, Brown, 1859); see Lawrence M. Friedman and Jack Ladinsky, "Social Change and the Law of Industrial Accidents," *Columbia Law Review* 67, no. 1 (1967): 50–82, 52.

3 I draw these examples from Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I, 2 vols.* (Cambridge: Cambridge University Press, 1895), 2: 471–472; and Matthew Hale, *The History of the Pleas of the Crown* (1736) (London: E. Rider, 1800), 1: 419–423.

4 William Pietz, "Death of the Deodand: Accursed Objects and the Money Value of Human Life," *Res: Anthropology and Aesthetics* 31 (Spring 1997): 97–108, 107. On the decisive role played by insurance in contemporary tort law, see Peter Cane, *Atiyah's Accidents, Compensation and the Law*, 8th ed. (Cambridge: Cambridge University Press, 2013), 245–254.

5 In Jane Bennett's terms, alluding to the deodand: *Vibrant Matter: A Political Ecology of Things* (Durham, NC: Duke University Press, 2010), 8–10. The concept of (legal) personhood is often enmeshed with, and extended to, non-human

animals and things (see John Frow's chapter, "Personhood," in this volume).

6 Oliver Wendell Holmes, Jr., *The Common Law* (1881) (Cambridge, MA: Harvard University Press, 2009), 3–36; J. J. Finkelstein, "The Ox That Gored," *Transactions of the American Philosophical Society* 71, no. 2 (1981): 1–89; J. J. Finkelstein, "The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty," *Temple Law Quarterly* 46 (1973): 169–290.

7 See E. P. Evans, *The Criminal Prosecution and Capital Punishment of Animals* (London: Heinemann, 1906). Analytical accounts include Finkelstein, "Ox That Gored," 48–86; Esther Cohen, "Law, Folklore and Animal Lore," *Past and Present* 110 (1986): 6–37; and Peter Dinzelbacher, "Animal Trials: A Multidisciplinary Approach," *Journal of Interdisciplinary History* 32 (2002): 405–421.

8 On the deodand's function and history, I rely on Harry Smith, "From Deodand to Dependency," *American Journal of Legal History* 11 (1967): 389–403; Elizabeth A. Cawthon, "New Life for the Deodand: Coroners' Inquests and Occupational Deaths in England, 1830–46," *American Journal of Legal History* 33 (1989): 137–147; Teresa Sutton, "The Nature of the Early Law of Deodand," *Cambrian Law Review* 30 (1999): 9–20; Teresa Sutton, "The Deodand and Responsibility for Death," *Journal of Legal History* 18, no. 3 (1997): 44–55; and Anna Pervukhin, "Deodands: A Study in the Creation of Common Law Rules," *American Journal of Legal History* 47 (2005): 237–256.

9 Sutton, "Early Law," 13–14; Pervukhin, "Deodands," 251–252.

10 Pietz, "Death of the Deodand," 97.

11 Sutton, "Early Law," 11–12.

12 Ibid., 12.

13 Ibid. On the influence of such early notions on Anglo-American forfeiture law, see Paul Schiff Berman, "An Anthropological Approach to Modern Forfeiture Law: The Symbolic Function of Legal Actions Against Objects," *Yale Journal of Law & the Humanities* 11 (1999): 1–45. One intriguing example of civil forfeiture, *in rem* actions against obscene books, preserves the early law's expiatory dimension: see Robert Spoo, "*Ulysses* as Deodand: Books, Automobiles, and the Law of Forfeiture," in *Joyce and the Law*, ed. Jonathan Goldman (Gainesville: University Press of Florida, 2017), 246–261.

14 Sutton, "Early Law," 9.

15 See especially Cawthon, "New Life"; and Pietz, "Death of the Deodand."

16 Elizabeth A. Cawthon, *Job Accidents and the Law in England's Early Railway Age* (Lewiston, NY: Edwin Mellen Press, 1997), 10. The deodand scholarship's reliance on coroners' reports provides another instance of the variable uses to which legal documentation was put prior to mid-nineteenth-century standardization. See Andrew Benjamin Bricker's chapter, "The Functions of Legal Literature and Case Reporting Before and After *Stare Decisis*," in this volume.

17 Maitland, *History of English Law*, 2: 473. On accidents, industrialism, and the law in nineteenth-century Britain, see P. W. J. Bartrip and S. B. Burman, *The Wounded Soldiers of Industry: Industrial Compensation Policy, 1833–1897* (Oxford: Clarendon Press, 1983); Cawthon, *Job Accidents*; and Jamie L. Bronstein, *Caught in the Machinery: Workplace Accidents and Injured Workers in Nineteenth-Century Britain* (Stanford, CA: Stanford University Press, 2007).

18 Cawthon, *Job Accidents*, ii; on Victorian coroners' shifting medico-legal status, see 95–110.

19 Cawthon, "New Life," 138 (quoting a phrase habitually used in coroners' inquests).

20 Sutton, "Early Law," 17–20.

21 Cawthon, "New Life," 140.

22 Ibid., 138, 141.

23 Ibid., 140, 141, 137–138.

24 "Introductory Article," *The Economist* (August 1, 1843): 4. See Pietz, "Death of the Deodand," 97–99.

25 Cawthon, *Job Accidents*, 141–144; Pietz, "Death of the Deodand," 106.

26 Cawthon, "New Life," 147.

27 The statutes are 9 & 10 Vict. (1846) c. 62 and c. 93 (the latter known as Lord Campbell's Act).

28 Michael Ashley Stein, "Victorian Tort Liability for Workplace Injuries," *University of Illinois Law Review* (2008): 956–957, 974–975; Cawthon, *Job Accidents*, 75–76, 144–145.

29 For a comprehensive overview of passenger litigation, see R. W. Kostal, *Law and English Railway Capitalism, 1825–1875*, rev. ed. (Oxford: Clarendon Press, 1997), 279–311. *Pym v. Great Northern Railway Co*. (1862), 31 L. J. Q. B. 249, initially awarded an astronomical £13,000 to a wealthy passenger's family (295). Donal Nolan offers a more favorable account in "The Fatal Accidents Act 1846," in *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change*, ed. T. T. Arvind and Jenny Steele (Oxford: Hart, 2013), 131–157.

30 Pietz, "Death of the Deodand," 97, 106.

31 The emergence argument was first articulated by Percy H. Winfield, "The History of Negligence in the Law of Torts," *Law Quarterly Review* 42 (1926): 184–201; and qualified by C. H. S. Fifoot, M. J. Prichard, and J. H. Baker: see Michael Ashley Stein, "*Priestley v. Fowler* (1837) and the Emerging Tort of Negligence," *Boston College Law Review* 44 (2003): 689–731, 701–708. On negligence's current elements, see Cane, *Atiyah's Accidents*, 32–50, 66–90.

32 Stein, “Victorian Tort Liability,” 941. For further discussion, see Stein, “Victorian Tort Liability,” 939–942; Winfield, “History of Negligence,” 185–190; W. R. Cornish and G. de N. Clark, *Law and Society in England 1750–1950* (London: Sweet and Maxwell, 1989), 489–493; and Kostal, *Law and English Railway Capitalism*, 284–287.

33 Stein, “*Priestley v. Fowler*.”

34 See Bartrip and Burman, *Wounded Soldiers*, 24–25, 97–125; Cornish and Clark, *Law and Society*, 494–500, 508–512; Kostal, *Law and English Railway Capitalism*, 257–279; Stein, “*Priestley v. Fowler*,” 712–716; and Stein, “Victorian Tort Liability.”

35 The Law Reform (Personal Injuries) Act (1948) abolished the doctrine of common employment and the Law Reform (Contributory Negligence) Act (1945) afforded (partial) remedy in situations of contributory negligence. Cane, *Atiyah’s Accidents*, 32, 50–52.

36 Bartrip and Burman, *Wounded Soldiers*, 123–124; Stein, “Victorian Tort Liability,” 964–982; Kostal, *Law and English Railway Capitalism*, 311–321 (distinguishing “liberal contractarianism” (318) in work-related cases from costlier public safety decisions in passenger cases). See generally A. W. B. Simpson, *Victorian Law and the Industrial Spirit* (London: Selden Society, 1995).

37 Wex S. Malone, “Ruminations on the Role of Fault in the History of the Common Law of Torts,” *Louisiana Law Review* 31 (1970): 1–44, 40.

38 On these cases, see Kostal, *Law and English Railway Capitalism*, 271–273; and Stein, “Victorian Tort Liability,” 944–948, 958.

39 Bartrip and Burman, *Wounded Soldiers*, 115.

40 The statutes are 43 & 44 Vict. c. 42, 60 & 61 Vict. c. 37, and 6 Edw. 7 c. 58. For the legislative debates see Bartrip and Burman, *Wounded Soldiers*, 126–206; and Cornish and Clark, *Law and Society*, 520–538. For a medico-legal account, reading these developments largely in relation to (breach of) contract, see Karl Figlio, “What Is an Accident?” in *The Social History of Occupational Health*, ed. Paul Weindling (London: Croom Helm, 1985), 180–206. Accident’s occupational dimensions are key to later disability studies approaches to law (see Rabia Belt and Doron Dorfman’s chapter, “Disability, Law, and the Humanities: The Rise of Disability Legal Studies,” in this volume).

41 Cane, *Atiyah’s Accidents*, 29–65.

42 Finkelstein, “Ox That Gored,” 48–51.

43 Maitland, *History of English Law*, 2: 472–473.

44 Holmes, *Common Law*, 7. On Holmes and the deodand, see Pietz, “Death of the Deodand,” 99–101.

45 Maitland, *History of English Law*, 2: 473.

46 Nolan, “Fatal Accidents Act 1846,” 151–152 (quoting an 1849 opinion of Pollock).

47 Cawthon, *Job Accidents*, 84. On accidental genres in Victorian newspapers, see Paul Fyfe, *By Accident or Design: Writing the Victorian Metropolis* (Oxford: Oxford University Press, 2015), 31–66.

48 See Allison Fieldberg, “1834: ‘Melancholy and Affecting Accident: Eleven Persons Drowned,’ ” *Victorian Review* 40, no. 2 (2014): 13–17.

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50 “Ground in the Mill,” *Household Words* 9, no. 213 (1854): 224; “Deadly Shafts,” *Household Words* 11, no. 274 (1855): 495.

51 On these topics and novels, see Mike Sanders, “Manufacturing Accident: Industrialism and the Worker’s Body in Early Victorian Fiction,” *Victorian Literature and Culture* 28, no. 2 (2000): 313–329; and Fyfe, *By Accident or Design*, 100–131, 184–190, 203–210.

52 For a compelling account of accident in the eighteenth-century novel, which also makes use of the deodand, see Sandra Macpherson, *Harm’s Way: Tragic Responsibility and the Novel Form* (Baltimore, MD: Johns Hopkins University Press, 2010), especially 42–44, 137–145. Although I am sympathetic to Macpherson’s emphasis on “the centrality of accident and injury to the realist novel” (4), I would dispute her identification of the deodand with strict liability and the claim that it “made persons responsible *for* the actions of things […] by turning them *into* things” (15). Further, the developments in negligence sketched above warrant, I believe, a more shaded account than a shift from the eighteenth-century novel as, “like tragedy, a form of strict liability” (10) to the nineteenth-century novel as, like comedy, a form of understanding suited to an “era of exculpation” (190), as Macpherson’s discussion of Dickens implies (175–177, 189–190).

53 “The English Mail-Coach,” in *Confessions of an English Opium-Eater and Other Writings*, ed. Robert Morrison (Oxford: Oxford University Press, 2013), 198.

54 Ibid., 184.

55 Ibid., 179.

56 Ibid.

57 Ibid., 180.

58 Ibid.

59 Ibid., 180–181.

60 Ibid., 203.
61 Ibid., 183.
62 Ibid., 183–184.
63 Ibid., 209.
64 Ibid., 212.
65 Ibid., 207.
66 Ibid., 205.
67 Ibid., 209.
68 Ibid., 210.
69 Ibid., 213.
70 Ibid., 212.
71 Ibid., 212–213.
72 Ibid., 183. See John Plotz, *The Crowd: British Literature and Public Politics* (Berkeley: University of California Press, 2000), 101–126; and Ruth Livesey, *Writing the Stage Coach Nation: Locality on the Move in Nineteenth-Century British Literature* (Oxford: Oxford University Press, 2016), 16–17.
73 Mary A. Favret, *Romantic Correspondence: Women, Politics, and the Fiction of Letters* (Cambridge: Cambridge University Press, 1993), 206; see generally 203–213.
74 "English Mail-Coach," 173.
75 Thomas Hardy, *Tess of the d'Urbervilles*, ed. Juliet Grindle and Simon Gatrell (Oxford: Clarendon Press, 1983), 41.
76 Ibid., 43.
77 Ibid., 43–44.
78 Ibid., 44.
79 Ibid.
80 Ibid. Discussing *Leame v. Bray* (1803), 3 East 593, in *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* (1887), 4th ed. (London: Stevens and Sons, 1895);, Pollock notes that "driving on the wrong side of the road […] of itself is want of due care" (132), but his illustrative examples of negligence might (partly) exonerate Tess if the other driver had not exercised reasonable precaution (592, 594–595).
81 *Tess of the d'Urbervilles*, 44.
82 Ibid., 45.
83 If unfamiliar with deodand earlier, Hardy encountered it when transcribing a review of Grant Allen, *The Evolution of the Idea of God* (1897), which describes the survival of "barbaric conceptions [that] extend life and intelligence of some sort to phenomena"; *The Literary Notebooks of Thomas Hardy*, ed. Lennart A. Björk (New York: New York University Press, 1985), 2: 367.
84 *Tess of the d'Urbervilles*, 46.
85 Ibid., 56.
86 Adam Smith describes the modest negligence that "consists merely in a want of […] [t]hat timid circumspection which is afraid of every thing, [and] is never regarded as a virtue." *The Theory of Moral Sentiments*, ed. D. D. Raphael and A. L. Macfie (Indianapolis, IN: Liberty Fund, 1982), 103–104.
87 *Tess of the d'Urbervilles*, 70.
88 E. M. Forster, *Howards End* (London: Penguin, 2000), 290, 18.
89 Ibid., 21.
90 Ibid., 74.
91 *Wing v. L.G.O.C* and *Parker v. L.G.O.C* (both 1909): see J. R. Spencer, "Motor-Cars and the Rule in *Rylands v. Fletcher*: A Chapter of Accidents in the History of Law and Motoring," *Cambridge Law Journal* 42 (1983): 69–73, who also notes that the Road Traffic Act (1930) made compulsory the type of liability insurance Forster mentions (77).
92 *Howards End*, 181.
93 Ibid.
94 Ibid., 182, 183.
95 Ibid., 75.
96 Ibid., 41, 114, 271.
97 Ibid., 43, 91.
98 Ibid., 51.
99 Ibid., 283.
100 Ibid., 159.
101 Ibid., 277.
102 Ibid., 277, 285.

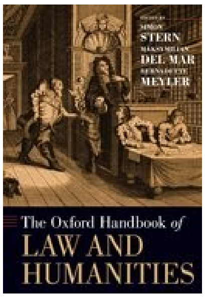
103 Ibid., 260.

104 Ibid., 279, 285.

105 Ibid., 266.

106 Paul Fyfe, “Illustrating the Accident: Railways and the Catastrophic Picturesque in the *Illustrated London News*,” *Victorian Periodicals Review* 46, no. 1 (2013): 61–91.

107 *Howards End*, 138.



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CHAPTER

19 Facing Justice: Evidence, Legibility, and Pensiveness in the Early Modern Imagination

Subha Mukherji

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Abstract

Law and the literary imagination in early modern England had shared stakes in the relation between face and intent, surface and significance, truth and semblance, nature and artifice. Using the legally attuned dramatist John Webster's *The White Devil* as its central example, this chapter probes law's preoccupation with legibility and the way in which drama enters into dialogue with it. In the process, law emerges an interface between an expressive mode and a hermeneutic model, and thus an imaginative resource for literary writers interested in selfhood and inwardness. Ultimately, the argument intimates how the gaps and dualities of the interrelation between the theatre and the law are used by early modern dramatic practice to conceptualize the larger interrelation between literary and legal epistemologies.

Keywords: evidence, character, hearsay, physiognomy, legibility, hermeneutic/s, transparent/transparency, Sir Walter Raleigh, John Webster, The White Devil

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> … it is impossible for me not to feel that my body is other than I, that I inhabit it like a house, and that my face is a mask which, with or without my consent, conceals my real nature from others.
>
> —W. H. Auden, *Hic et Ille*

> For me, nothing is natural, not even nature.
>
> —Pier Paolo Pasolini, *De Giusti*

IN Shakespeare's poem *The Rape of Lucrece*, the raped Lucrece, who has lamented copiously for some two thousand lines, struggles to write of her plight to her husband Collatinus. She jots down many words and blots them, writes reams and tears them, and eventually writes only the briefest note urging him to come home quick, so that

> By this short schedule Collatine may know
> Her grief, but not her grief’s true quality.[1]

Desisting from making her case in a letter, she chooses, instead, a different approach:

> […] the life and feeling of her passion
> She hoards, to spend when he is by to hear her
> p. 354 ↳ When sighs and groans and tears may grace the fashion
> Of her disgrace, the better so to *clear* her.
>
> (ll. 1317–1320, emphasis mine)

She has mentally constructed the scene of disclosure as a trial where she has to clear herself from “that suspicion which the world might bear her” by presenting a text that is less liable than words to misconstruction, more within her power to control: embodied presence. Hovering around this resolve is the familiar notion of physiognomy, often manifest at crisis points in literature. When Shakespeare’s Macbeth marvels at what he thinks is the unnatural opacity of Lady Macbeth’s complexion and the imperviousness of her face, despite the conscience-chilling sight of Banquo’s ghost, he is drawing on the physiognomic notion of irrepressible natural correspondence:

> You make me strange
> Even to the disposition that I owe,
> When now I think you can behold such sights,
> And keep the natural ruby of your cheeks,
> When mine is blanch’d with fear.
>
> (*Macbeth*, III.iv.111–115)

But physiognomic thinking is remarkably often conjunct with legal imagination, and conscience with manifestation, in litrary practice, especially drama. Hamlet goes beyond affective reference and subjective guilt to bank specifically on the assumed evidentiary uses of the supposedly uncontrollable expressiveness of the face. He springs his “Mouse-trap” on his uncle Claudius in search of confirmation of his suspicion—apparently created by the supernatural revelation by the Ghost of Old Hamlet—that Claudius has murdered his father before marrying his mother:

> […] I’ll have these players
> Play something like the murder of my father
> Before mine uncle, I’ll observe his looks,
> I’ll tent him to the quick. If a” do blench
> I know my course. …
>
> (*Hamlet*, II.ii.598–603)

Significantly, Ellen Spolsky focuses on this very scene from Hamlet to reflect on the battle of interpersonal cognitive investigations between Hamlet and Claudius, and the wishful suppositions of physiological transparency that underlie them.[2] Is this association between bodily self-evidence and legal knowledge of intention a mere literary fantasy?

p. 355 A sort of answer can be found in such comments as that of Ferdinand Pulton of Lincoln’s Inn, who, in his treatise *De Pace Regis* (1609), writes that upon a plea of not guilty to an indictment of treason or felony, the defendant

> must answer it in proper person, and not by Atturney, or councell learned. […] And if the partie himselfe defend it … *his countenance, or gesture will shew some tokens therof*, or by his simple speeches somewhat may be drawne from him to bolt out the veritie of the cause, which would not be won of men learned in the Law, who endeauour to speake prouidently, and artificially [italics mine].[3]

One of the reasons why defendants in criminal trials were allowed no counsel but could—and indeed had to—speak for themselves as best they could, was the idea that this might provide supplementary evidence by way of expressive gestures which would help establish the truth. Walter Raleigh, famously, was denied benefit of counsel in his treason trial.[4] Law’s necessary investment in legibility meant that discourses that presupposed a correspondence between inner and outer were co-opted at need into legal use. Pulton’s gloss suggests not only the connection between legal psychology and contemporary physiognomy but also the assumption that the best proofs are self-evident and natural, even if legal procedure may involve artifice. Yet when Raleigh demanded to meet the witness against him “face to face,” the crown prosecutors denied his request—a landmark in the historical development of the right of confrontation in criminal cases which became the norm in English common law courts by the later seventeenth century.[5] Originating in ancient Roman law, this adversarial model entered English law with objections to hearsay evidence. Testimony from absent witnesses was regularly admitted as sufficient in criminal courts in the sixteenth century, “if it were proved to be upon the oaths of others.”[6] But the sense that hearsay evidence was suspect was, as far as we know, first noted as early as 1555 in Judge James Dyer’s circuit note on the case of *R v. Sherwin*, where “the
p. 356 jury was caused to return to court in the prisoner’s presence, so that he might hear it.”[7] In 1569, Sir William
↳ Cecil remarked, in Star Chamber, that “more trust is to be placed in witnesses who are present than in the evidence of those who are absent.”[8] Frederick Koch’s revision of John Henry Wigmore’s theory about the rationale behind the exclusionary rule about hearsay, in the context of its percolation into contemporary Canadian law, usefully clarifies the importance of “demeanor evidence” among the rules that fed into the exclusionary rule. Though Koch dates it to the early seventeenth century, his argument illuminates the core rationale behind the assumption of the unreliability of such evidence: not the perceived competence of professional triers of fact (judges) as opposed to lay triers (jury) at common law, but ideas about the nature and credibility of the evidence itself.[9] His outline of the use of such logic at Equity courts before common-law applications underscores this point in correcting Wigmore’s emphasis on the quality of the evidentiary assessors rather than the material for, and method of, evaluation: at Chancery, for instance, the trier of fact was always a judge. Information drawn from appearance and through cross-examination, it seems, was increasingly deemed to be more accurate and revealing than unsworn and pretrial testamentary evidence given in absentia across common-law and equity courts in early modern England. Eventually, the legal assumption of the unreliability of hearsay proof, which hardened into exclusionary rules of in the later seventeenth century, formed the basis of the confrontation clause in the Sixth Amendment to the Constitution of the United States. Raleigh’s trial in 1603 seems to mark a transitional juncture in legal thinking when physical presence of the defendant was considered a guarantor of fairness, yet the common law had not quite got its head around the ethical underpinnings of cross-examination in court, or—a still more specific encounter—making an accusing witness and a defendant physically face one another. Quintilian, familiar to early modern England through the humanist curriculum, allows for testimony from both absent and present witnesses but stresses that the testimony of live witnesses is significantly more credible.

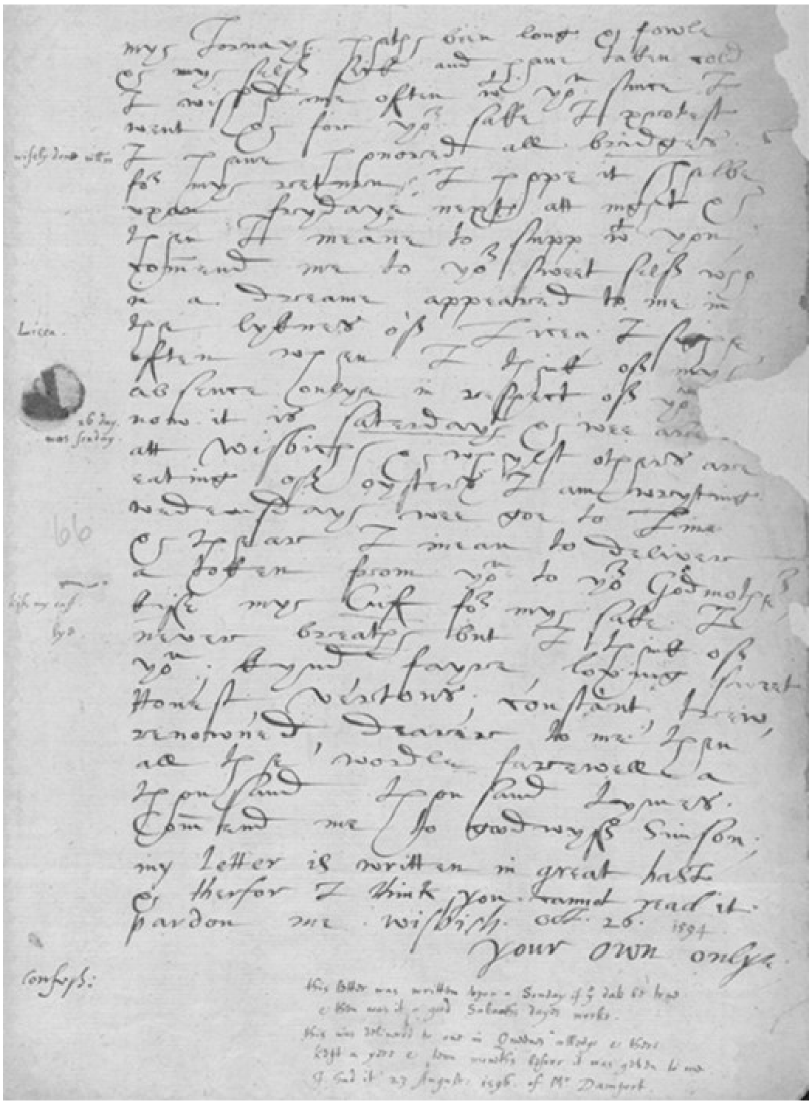
Implicit, too, is a privileging of spontaneous effect over the patently scripted and premeditated. Luke Wilson’s seminal essay on early modern tool abuse has alerted us to the legal implications of extemporaneous action as opposed to premeditation with reference to the evolution of the concept and law of manslaughter in this period.[10] Wilson shows how the improvisational use of a tool for an end that is distinct from the purpose for which it was made could result in a charge of manslaughter where the charge might ordinarily have been one of murder. Tool abuse, in other words, is treated as an example of the kind of "sudden encounter" on which the definition of manslaughter was premised, as "manslaughter" emerged as a legal category.[11] At stake are agency, moral culpability, p. 357 ↳ and indeed legibility, though the latter is only tacit in Wilson's account. "Malice aforethought," by several statutes, disqualified homicide convicts of the benefit of clergy. Manifest lack of premeditation, or proof of accidentality, could form a basis for clemency or mitigation of criminal liability. Wilson, however, goes on to suggest that suddenness could cut both ways: acting in some cases as a sign of extemporaneous action and therefore of an absence of "malice prepense," but in other situations, as a refusal of apparent social meaning and explicability which was the very condition that intimated a depth of motivation—a lack of transparency—that invited inferential reading. The judicial distinction between murder and manslaughter, after all, did not emerge into anything like hard clarity until the late sixteenth century; "deliberate but of a sudden" culpable homicide was a category recognized until such time, according to Thomas Green, historian of evidence and criminal liability.[12] The fluidities of the preceding century and a half—and indeed the somewhat obscure thinking behind spontaneity on occasions suggesting deliberate action—provided the space for the emergence of a duality which was especially productive for mimetic engagements: a point I will return to. Suffice it to note, for now, the legal association of spontaneous action with a lack of artifice or premeditation, with corresponding implications for criminal agency. Note, too, the implicit link between judicial thinking about spontaneity and the legal assumption that observable witness behavior on the stand provides a wealth of "intangible information" that lacks the hermeneutic resistance that can be inbuilt in premeditated action or speech;[13] an implied association between artlessness and being put on the spot before the gaze of the open court, whether the observer was the judge, the jury, or the accused. Koch's outline of the relevant history of evidence unpacks how hearing and seeing the witness was supposed to provide access to authentic truths that elude conscious textual or artful attempts at concealment.

But literary art is acutely alive to the degrees of opacity that need to be negotiated in reading another, and of the artifice of hermeneutics at either end. When Shakespeare's poem talks of Lucrece as a naïve reader of the "subtle shining secrecies/Writ in the glassy margents of such books" as the treacherous Tarquin's face (ll. 101–102), the metaphor is the familiar one of the face as a text. But the page has a physiognomy too, not least in the legal archives. See, for example, these documents from the Vice Chancellor's Court in Cambridge, preserved in a box of "exhibits" from a case tried in 1596 (see Figures 19.1–19.3).[14] What "secrecies" are written in their "margents"? What light do they shine on the main text, and what subtleties do they present to the reader in the law court? These are exhibits that turn up in an adultery case tried in the Cambridge Vice Chancellor's Court in 1596. Bridget Edmunds, wife of John Edmunds, employee of Peterhouse, was brought to court on suspicion of adultery with William Covile, Fellow in Divinity at Queen's College. After briefly protesting innocence, Bridget confessed p. 358 ↳

p. 359 ↳

and turned witness for prosecution along with her husband. These are a set of love letters, sent by William to Bridget, intercepted by John and presented as exhibits in court. Exhibits were regarded as a form of demonstrative evidence in the English legal context, despite jurisdictional variation—among the concrete objects that were meant to be the most persuasive, by virtue of being presented directly to the senses without narrative p. 360 ↳ mediation. This is no different from their status for the ancient Athenian jury system—a judicial structure early modern playwrights were influenced by, through literary and rhetorical transmission. These letters, then, are texts which become objects as they are produced in court as exhibits—inartificial proofs, presented to bring the court audience as close as possible to an alleged "deed": its scene, its time, and its intent.

Figure 19.1



my letter is written in great hast
& therfor I think you cannot read it.
pardon me. wisbish. oct. 26. 1594
your own onlye.

Letter from William Covill to Bridget Edmunds. Exhibit 66, Edmunds vs Edmunds, Vice Chancellor’s Court, Cambridge, 1596.

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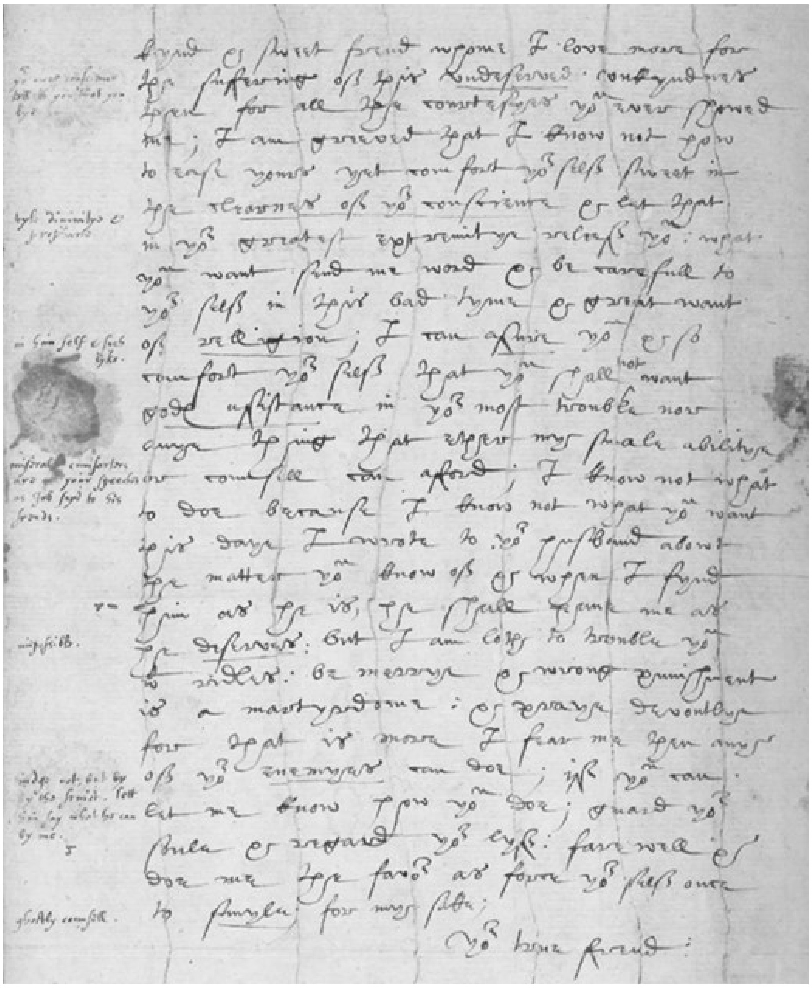
Figure 19.2



kynde & sweet frend whome I love more for the sufferinge of this undeserved contynuance then for all the curtesyes you ever shewed me; I am greeved that I know not how to ease yours yet comfort yourself sweet in the clearnes of your conscience & let that in your greatest extremitye releve you: what you want send me word & be carefull to yourself in this bad tyme & great want of religion; I can assure you & so comfort yourself that you shall not want good assistance in your most trouble now amonge thinges that eyther my small abilitye or counsell can afford; I know not what to doe because I know not what you want this day I wrote to your husband about the matter you know of & when I fynd him as he is, he shall thank me as he deserves: but I am lothe to trouble you [illegible] order: be merrye & wrong punishment is a martyrdome: & praye devoutlye for that is more I fear me then any of your enemyes can doe; if you can let me know how you doe; guard your soule & regard your eyes: farewell & doe me the favour as for yourself once to smyle for my sake;

Your kinde frend:

Letter from William Covill to Bridget Edmunds. Exhibit 67a, Edmunds vs Edmunds, Vice Chancellor’s Court, Cambridge, 1596.

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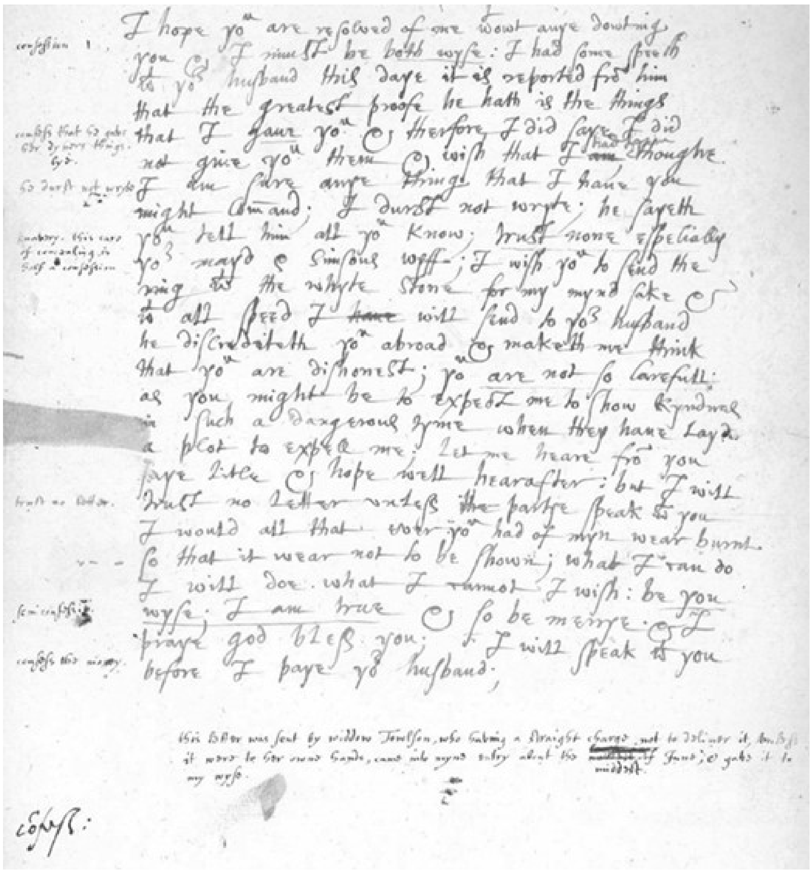
Figure 19.3



confession

confesss that he gave her dyvers things

he durst not wryte

knavery. this care of concealing is half a confession

trust no letter.

semi-confession

confesse the money

I hope yow are resolved of me wout anye dowting
you & I must be both wyse: I had some speech
to yor husband this daye it is reported from him
that the greatest proofe he hath is the things
that I gave yow & therfore I did saye I did
not give yow them & wish that I ~~am~~ had bene thought
I am sure anye thinge that I have you
might comand; I durst not wryte: he sayeth
yow tell him all yow know; trust none especially
yor mayd & Simsons wyff; I wish yow to send the
ring wt the whyte stone for my mynd sake &
to all speed I ~~have~~ will send to yor husband
he discreditith yow abroad & maketh me think
that yow are dishonest; yow are not so carefull:
as you might be to expect me to show kyndnes
in such a dangerous tyme when they have layd
a plot to expell me; let me heare from you
saye litle & hope well hearafter: but I will
trust no letter unless the partye speak to you
I would all that ever yow had of myn wear burnt
so that it wear not to be shown; what I can do
I will doe. what I cannot I wish: be you
wyse; I am true & so be merrye. & I
praye god bless you; & I will speak to you
before I paye yor husband;

this letter was sent by widdow Tomlson, who having a straight charge not to deliver it, unless it were to her owne hands, came into myne entry about the ~~[illegible]~~ midnight of June; & gave it to my wyfe.

Letter from William Covill to Bridget Edmunds. Exhibit 68, Edmunds vs Edmunds, Vice Chancellor’s Court, Cambridge, 1596.

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But let us look harder at the margins: they are not just unsettling but unsettled. The letters were annotated by John (the husband) over a period of two years, for presentation as evidence. There are two layers of annotation. One set of notes is in darker ink: quasi-legal notations on details that may aid his case; but these are shot through with ↳ more spontaneous expressions of moral condemnation and outrage, constituting a (presumably) earlier layer of notes in lighter ink. In Figure 19.3, for instance, John notes “confess the money” at the bottom left corner, next to Covill’s allusion to his intention to pay Bridget’s husband; where Covill writes “be you wise, I am true,” John scribbles, “semi-confession”; further up the left margin, there are various points he earmarks as “confession”: against Covill’s urgent suggestion that he and Bridget “must both be wise,” for instance; he also notes Covill’s admission that “he gave her dyvers things”; an acute close reader, he calls Covill’s exhortation to Bridget to trust no one “knavery”: “this care of concealing is half a confession.” In the left margin of the first letter, he notes an inconsistency about the dates Covill mentions in the body of the letter, and sums up at the bottom: “written upon a Sunday if the date be true.” But he then goes on to add a righteously mocking half-sentence: “& then was it a good Sabbath dayes work.” But the spontaneous and the premeditated, compressed in two halves of this single annotation, is at all other times divided into the two layers of notes across the letters. For interspersed with such carefully judicial observations as these noted above, there are declamations such as “lye” (Figure 19.1) or “impossible” (Figure 19.2). In the first letter, he sarcastically writes, “wisely done William” where Covill protests he has “honored all bridges” “for [her] sake,” indulging in a lover’s pun on the beloved’s name. These missives function as what Gerard Genette would call “hypertexts”: older texts—love letters—are being written over with newer ones—outraged husband’s exclamations—which in turn are written over with evidentiary comments by the husband as lay prosecutor. The material form of these documents, then, provides evidence of "secrecies" that go beyond the familiar, evidentiary register of the letters themselves: they bear witness to the process of the narrative *construction* of proof, and the conversion of intimate utterances, private acts, into objects of public, institutional display. What they make visible is, precisely, mediation—artifice which does not lend itself to institutional acknowledgement.

In contrast with this deliberate transformation of personal epistles into legal artefacts, the maid Elizabeth Atkins's witness deposition from the same case would seem a relatively naïve, direct response (one of many) to interrogatories trying to ascertain the act of sex:

> She … did looke into the saide Hall, … the dore … being open, and did then see the said Mr. Covyll and hir said Mistris…naughte togither … in a Chayre … by the fyre, her … Mistris … sittinge in the … Chayre, and Mr. Covyll haveinge his gown one, and she sawe hir Mistris hir heade then hange over the … Chayre, and her hands aboute Mr. Covills middle, and did then and there here [=hear] the said Mr. Covill blusteringe and blowinge verie muche, and afterwards did see him in the yarde … (… to coole him selfe), verie redd in his face.[15]

Evidence, both the term and the practice, had to do with seeing (from Latin *videre*). Sexual litigation focuses the absence and invisibility at its heart: sex, like criminal action, cannot ever be literally re-presented in court. But it is also unlikely to be witnessed p. 362 ↳ first-hand. The maid's vivid evocation—already imagined rather than seen—through a narrative of visible circumstantial signs, is meant to bring the scene alive before the eyes of the court. Inasmuch as such *enargeia*, deemed crucial for persuasion in forensic rhetoric, was part of the cultural imaginary, even a report like this may be conditioned by an assimilated rhetorical understanding; but the context of reception certainly frames its figurative potential. Another servant, John Fletcher, deposes in terms that vividly illuminate the synecdochic function of testimonial proof. Asked if he saw Covill shut the door, when he shut the door, and what he had on when he shut the door, he says,

> the candle beinge out … and it beinge in the darcke, dicit that when he came upp he did see the said Mr. Covill with haste shutt the said chamber doare uppon him, and in the shuttinge of yt he did see Mr. Covills white band and a peece of his … gowne did hange oute at the said chamber doare it being shut soe speedilie.[16]

The idea of evidence as a visible part for the invisible whole, a sign for the act, or fact, of signified intimacy, is nowhere clearer. In the Vice Chancellor's court, however, it serves as an artless portrait of a remembered scene of adultery, as the evocative reconstructions of synecdoche get obscured by the apparent immediacy of fragmented remembrance; as narrative art gets overlaid by the urgency and expediency of the context of narration.

These glimpses of early modern evidentiary process touch on the irony inherent in legal semiotics: the assumption that designated external signs can be reliable indices of the truth of intention or of nature—the theoretical quarry of legal search; that they make past action visible in a different space and time; or indeed that they can be extricated from artifice. "Fact" (or alleged deed), in its legal sense, was an artefact of the courtroom, like "issue" (a legal point of contention)—both starting points for judicial decisions, no matter how distant from the original dispute, converted into categories the court could deal with.[17] The law is, of course, aware of slippages between sign and signified: that is clear in early legal treatises such as St. German's *Doctor and Student* (on common law) or Henry Swinburne's canon law *Treatise of Spousals*, where uncertainty as well as artifice are actively negotiated and sometimes exorcised, through narrative strategies that we would now call "literary" (dialogue and ampliation). But its practice is eloquent of both the institutional necessity and inevitability of such elision in the courtroom.

How do literary texts—at home in artifice—use the *formal* affiliations of evidentiary experience as an imaginative resource? In particular, how does theatrical performance deploy its own entanglement with the conditions of legal representation to probe the hermeneutic negotiations at the interface between the mind and the body, and between the body and the world? And, in turn, what are the aesthetic stakes of these semiotic relations? Dramatists were variously familiar with the law, as well as being inheritors of the Aristotelian rhetorical tradition. And their transactions with the law extended to the p. 363 ↳ shared business of representation. I will focus on a challenging example: the trial of Vittoria Corombona, the heroine of *The White Devil*, a play by John Webster, Middle Templar and Jacobean playwright. The focus is on Vittoria's body and her expressive modes. Accused of adultery and complicity in her husband's murder by her lover, Duke Bracciano—both of which the audience know she is guilty of—she is interrogated by the manifestly corrupt Cardinal Monticelso, with help from a petty, wordy, lawyer. Their adversarial encounter centers on Monticelso's attack on her artifice.

> MONTICELSO. I shall be plainer with you, and paint out
> Your follies in more natural red and white
> Than that upon your cheek.
> VITTORIA. O, you mistake.
> You raise a blood as noble in this cheek
> As ever was your mother's.
> MONTICELSO. I must spare you till proof cry whore to that.
>
> (*The White Devil*, III.ii.50–8)[18]

Monticelso says that his depiction of her follies will not only be more direct than the lawyer's legal bombast, but also more natural in its red and whiteness than her harlot's painted cheek. One cannot but use "paint" in any representation, but truthfulness is most itself when most like the red and white of the natural body. But Vittoria's body does not play ball: whether in its face-painting or its inherent beauty or the colors of her blushes, it creates a false semiotic. Frustrated, he presents Vittoria's very fairness as an evident spectacle of corruption: "If the devil/Did ever take good shape, behold his picture" (215–216). "This whore, forsooth, was holy" (76). Vittoria challenges his label: "Ha? Whore—what's that?" (76). Monticelso's reply puts a name to the exercise, immediately suggestive to a Jacobean audience:

> Shall I expound whore to you? sure I shall;
> I'll give their perfect *character …* (78–79, emphasis mine)

Quick to recognize Monticelso's formal strategy, Vittoria retaliates: "This *character* 'scapes me" (101, emphasis mine). Her shrewd counterimages use rhetorical re-description to project a "self" with such color of authenticity that it wins conviction not just from some of her court audience but also from us, despite our knowledge of her culpability; it works against the grain of the "cultural intuition" that Monticelso taps into:[19]

> These are but feigned shadows of my evils.
> Terrify babes, my lord, with painted devils.
> p. 364 ↳ I am past such needless palsy. For your names
> Of whore and murd'ress, they proceed from you …
>
> (146–151)[20]

The prime literary genre where the physiognomic idea is translated—alongside city comedy, Thomas Dekker's prison characters, and other portrayals of character types from the underworld—was character-writing, well established by 1607. Joseph Hall's *Characters of Vertues and Vices* appeared in 1608. Thomas

Overbury's *Characters* was published in 1614, but kept growing till the massive eleventh edition appeared in 1622. Pithy, witty, and aphoristic, it quickly became an Inns-of-court genre. There was art in it, and riddling, but the purpose was to capture and make visible the defining essence of a character type; a sketch of deeds that would make intent quickly legible, telescoping the cognitive process. As Donald Beecher puts it in his edition, "a missing part must be supplied, but the terms are so familiar that the cognitive search time is cut to a fraction."[21] The page of charactery becomes a physiognomic representation of the widow, A Puritan, A Flatterer, A Mere Common Lawyer, A Very Whore, or An Inns of Court Man. Contributors included John Cooke, John Donne, Henry Goodyear, Thomas Dekker, John Ford, and Webster. By far the most substantial contributions were Webster's—thirty-two sketches.

Webster, of course, was also a character artist in a different key. What relation do his dramatic characters bear to the creatures of his "charactery"? And what does law have to do with it? Theophrastus, to whom "charactery" at least nominally goes back, talks of the genre in terms of *charassein*—stamping so firmly as to make something instantly legible. In the classical rhetorical tradition, "character" was firmly associated with style: a distinct register, a goal of mimesis. Cicero's word for the ideal orator is *charactēr*,[22] while Theophrastus had used the same word to describe the *genera decendi*. In late sixteenth-century England, where Cicero's *De Oratore* as well as Melancthon's notes on his imitation theory were widely available, this sense was among its plural meanings. Webster, an inheritor of this semantic network, spotted in the word an elasticity which Theophrastus—if he did indeed write the *Characters*—had done nothing with. This he deploys to test the boundaries of theatrical reading relations against legal ones.

Monticelso's declared charactery of Vittoria evokes not just the "common whore" but also two other types:

p. 365

> And look upon this creature was his wife.
> She comes not like a widow; she comes armed
> With scorn and impudence. Is this a mourning habit?
>
> (III.ii.119–121)

In Webster's more famous play, *The Duchess of Malfi*, the Duchess also invokes both as she woos her steward Antonio, given to "[casing her] picture up" (I.i.207):

> This is flesh and blood, sir;
> 'Tis not the figure cut in alabaster
> Kneels at my husband's tomb. Awake, awake, man!
> I do here put off all vain ceremony,
> And only appear to you a young widow
> That claims you for her husband and, like a widow,
> I use but half a blush in't.
>
> (*Duchess of Malfi*, I.i.453–459)[23]

Among Webster's "characters" for the Overbury volume, contemporaneous with the first show of *Duchess*, were "A Virtuous Widow" and her foil, "An Ordinary Widow."[24] The Virtuous widow becomes a "monument" containing her dead husband, "*a relic* [who], will not be kissed, yet may be reverenced" (emphasis mine). These are the very terms in which the Duchess protests to her brothers, who won't let her remarry, "Why should I … Be cased up, like a holy *relic*? I have youth, / And a little beauty" (III.ii.137–140, emphasis mine). But in her wooing speech she is also archly, flirtily glancing at the "character" of the Ordinary Widow who, typically, can only spare half a blush when succumbing to new love. Webster's "character" of such a widow ends in the verdict: "Thus like a too-ripe apple she falls of herself …," referring to the rotten apples of Sodom and Gomorrah (*Characters*, 272).

This is the very image applied by Monticelso to describe the far less innocent widow, Vittoria, as he resorts to yet another discourse of natural evidence:

> You see, my lords, what goodly fruits she seems,
> Yet, like those apples travellers report
> To grow where Sodom and Gomorrah stood,
> I will but touch her and straight you shall see
> She'll fall to soot and ashes.
>
> (III.ii.63–67)

This recalls a moment in the anonymous 1590s play, *A Warning for Fair Women.* There, Anne Sanders, accused (and guilty) of adultery and complicity in murder, appears in p. 366 ↳ court with a white rose, "in token" of her "spotless innocence."[25] But in a spectacular display of the theatre of God's judgment, the rose turns color and reveals her to be a white devil. In the providentialist world of that play, Vittoria would indeed have crumbled to soot. But in *The White Devil*, nothing happens. Monticelso finds himself in the wrong genre—as Vittoria slams back her retort, his words fall flat. This is an encounter that always reminds me of a moment in Pier Paolo Pasolini's film *Medea* (1969). The casually confident, smugly rational Argonauts have anchored on a coast near Pelias's land, in the middle of their voyage, and are setting about to pitch camps, light fires, and settle down to an evening meal, whistling and joking. With her sense of the archaically holy, Maria Callas's Medea is outraged, and runs around frantically, warning them that the land is not consecrated, "has no foundation," and "will sink" if they continue to go about in this way, without respect, without seeking the center, without calling God's blessing on their tents, and without attuning themselves to the spirit of the place. But the place does not sink. Medea cannot make sense of the casual continuity of nature by her own parameters: what becomes (to use the Centaur's words) a "*catastrofe spirituale*" for her, is looked on by Jason and his men with amused puzzlement. She is an exile not only on this desacralized no-man's land but in the genre she finds herself in—in her environment, nature and the Gods do not make their outrage naturally self-evident.

Vittoria at her trial, however, *is* in the right genre; in a densely rhetorical play, which aligns its own medium with proofs of art. A clear signal of this texture is embedded early on in the trial scene. When Vittoria mocks the lawyer's bombast, he complains:

> My lords, the woman
> Knows not her tropes nor figures, nor is perfect
> In the academic derivation
> Of grammatical elocution.
>
> (III.ii.39–42)

Vittoria's grammar belongs to a different order of rhetoric—the "deep eloquence" that Francisco ironically attributes to the lawyer (III.ii.44). This in the key that Jeremy Bentham calls "deep play"—a game in which the stakes are so high that nobody would enter it on a rational basis.[26] While Bentham declared it irrational, Clifford Geertz found it the compelling principle at the heart of the large-center-bet Balinese cockfight, where men played at the highest stakes, not to break even but "in a momentary punctuate sort of way, win utterly."[27] The cocks would be matched as evenly as possible, and the p. 367 ↳ outcome would be entirely unpredictable. This is, for Geertz, "a means of expression," "a particulate burst of form," "a dramatic shape."[28] This is the economy in which Vittoria's performance operates. The medium of transaction she deals in is neither textbook grammar nor moral law but art, and with it, play. The originary work of artifice in the play is Vittoria's vividly visual report of her "foolish, idle dream" to her lover Bracciano (I.ii.232–256, 232). In this dream, her husband and his wife appeared threatening Vittoria who sat helplessly trembling, till a strong “yew”—slyly punning on “you”—dropped a massy arm and killed them both. Bracciano, no fool, picks up on the cue:

> Sweetly shall I interpret this your dream.
> [...]
> I’ll seat you above law and above scandal,
> Give to your thoughts the *invention* of delight
> And its fruition; ...
>
> (I.ii.260–266)

He has rightly understood the so-called dream as a rhetorical artefact—“invention of delight”—and grants it a different order of values from those of law and society. Vittoria’s rhetorical device is delightful in its persuasive power, not its moral or legal valency. This invites dialogue with Julia Simon Kerr’s explication of legal credibility as a performable code inextricable from social notions and generalizations of character, a human construct which has little to do with truth-telling.[29] More locally, it anticipates and vexes our response to Vittoria’s artifice in the trial scene. What kind of “character” does she present in that space, to confront Monticelso’s typecastings of her, as we watch them both flaunt images of art and orders of proof? What effect does Monticelso’s attempt to discredit her social worth have on the credibility of her specific court performance which is at once judicial and dramatic?

Their contest maps on to an Aristotelian hierarchy of proofs and signs, surely familiar not only to the rhetorically trained Webster, but to every grammar-school boy in the period. Here, materially self-evident proofs, corresponding to inartificial signs, were inferior to inherently probable, artificial proofs and signs. English legal practice, of course, inverted the hierarchy. Monticelso adduces inartificial proofs—details of time and place, concrete objects; petty details about “who lodged beneath [her] roof that fatal night,” and letters which are supposed to be straight-forward indices of sinful intent (192 ff.). He is correct. But in this trial, he does not persuade. Vittoria lies. She arrests the imagination of her fictional and theatrical courts. The parallel hierarchy (derived from *De Anima*) of images as instruments of proof had a revealing slippage: the conversion of the simple psychological image into the poetic image or eikon was meant to *turn* it into a forensic image. If Monticelso’s paintings just about qualify as simple images, the self ↳ Vittoria presents is a splendidly crafted *eikon*. Condemned to a house of convertites, she rounds off her defense with a masterly *conclusio*: p. 368

> It shall not be a house of convertites;
> My mind shall make it honester to me
> Than the Pope’s palace
>
> (III.ii.289–291)

Monticelso’s reductive portraits are pitted against Vitoria’s superbly protean presence. J. W. Smeed charts the history of charactery from its lighthearted, recreational satiric origins in Lesbos in 371 BC to its later moralizing which cast a weight upon its lightness in early modern adaptations.[30] The dramatic “character” of Vittoria comes, as it were, with an inbuilt sensor for the dual generic possibility in its prehistory; exploding its moral righteousness, she reduces it to its own parody. Webster himself plays with these contrary possibilities across the types of his character and the characters of his plays. In *The Duchess*, the idea of the instantly legible *impresa* of inner character in the externalities of the face is met with cynicism about physiognomy in the exchange between Ferdinand and Bosola on why the Cardinal hates Bosola:

> FERDINAND: May be some oblique character in your face
> Made him suspect you.

> BOSOLA: Doth he study physiognomy?
> There's no more credit to be given to th' face
> Than to a sick man's urine, which some call
> The physician's whore, because she cozens him.
>
> (*Duchess of Malfi*, I.i.234–239)

As Vittoria's own selfhood is fashioned and asserted in the other play, she gives a new meaning to "oblique character": one that goes beyond a straightforward engraving of moral perversity to intimate the inalienable obliquity of dramatic character. She comes to stand in the same relation to the Theophrastian "whore," or to Webster's own "Ordinary Widow," as the theatrical medium does to character writing which shares the representational principles of physiognomy, expediently co-opted by the law on the one hand, and providentialist discourse on the other.

Neither the competition nor the triumph, then, is on an ethical axis. The critical tendency to read legally engaged literature as equitable supplement to the law has been conspicuous in interpretations of the legal themes of *The White Devil*.[31] One can see why. When she refuses to "answer" the lawyer's pompous Latin. "Why, you understand Latin," says Francisco. She retorts, "I do, sir, but amongst this auditory / Which p. 369 come to hear my cause, the half or more / May be ignorant in't" (III.ii.14–17). The Red Bull, where ↳ the play opened, was a rowdy public theatre in the Northern suburbs. In this period, the nature of jury had changed from knowers of facts to independent assessors of fact.[32] So she is cleverly co-opting the theatre audience as the common man's jury. In the actual theatrical event, it works—even now, without those legal specificities. But conceptually, this is tricky. For one thing, in the eighteenth and nineteenth centuries, the role of the novel as equitable supplement to the law expands with the demise of Equity as a separate jurisdiction upon the implementation of the Judicature Acts of 1873–1875. In the early modern period, by contrast, there was a separate Equity jurisdiction, and this model does not apply directly. For another, this play complicates the idea actively and provocatively by making the audience knowers of facts too, and implicating them in a radical complicity.

But the agon of the trial is not a straightforward assertion of aesthetic or performative superiority either. It points to a larger reality of the interrelation of law and theatre. Vittoria, like Shakespeare's Cressida—and perhaps unlike Lucrece in the poem she inhabits—both "is, and is not," what she is ostensibly given to be. No less is theatrical personation: the boy in a frock representing Vittoria at the Red Bull would already always stretch the onstage body's capacity for manifestation. No less double was the Renaissance art of pleading—learned, among other means, through those learning exercises in the Inns which Webster would have taken: "moots," or sessions of arguing *in utramque partem* with invention, wit and memory. Justice Eitherside in Jonson's *The Devil Is an Ass*, or Mosca's jibe in *Volpone* that lawyers "could speake/To every cause, and things mere contraries,"[33] are satiric comments on the potential for the purely rhetorical in legal training itself; an exoneration from moral conviction. *The White Devil* deploys the twin space law itself inhabited but could not articulate, due to its disciplinary investments. The "mock trials" were supposed to provide the basis for a practical "science" which its theoretical proponents claimed to be, at the same time, a tool for establishing positive truth![34] The play pitches into the tension between legal education at the Inns p. 370 and legal writing and, to an extent, practice. It points to a complexity inherent in the ↳ relation between rhetoric and theatre since classical times, which goes beyond straight-forward affinity or difference. Rhetoric focused the performative aspects of legal procedure. But the legal tradition developed a resistance to acknowledging the fundamentally rhetorical character of legality, going back to Plato's distinction between verbal performance and the theatre of justice which would persuade to a truth beyond artifice. As Peter Goodrich shows, traces of this unease with the affective and social function of legal oratory found their way into the Renaissance, when the legal orator was meant to arrive at a "science or truth that exceeds the realms of contingency."[35] Vittoria embodies this paradoxical interrelation. Striking at legal procedure, she is nonetheless a creature made out of a logic of performance that lay at the heart of legal training. Her trial allows Webster to flaunt a radical ontology which is conscious of its similarity to law's fictions, but its superiority to law's semiotics.

Paradoxically, this makes the vexed epistemic interface of law more deeply mimetic than charactery. The white devil of the play signals that aspect of the play texts which is defiantly pensive, like Barthes's classic text, which, "replete with meaning," still holds in reserve "one last meaning, … whose place it keeps free and significant. […] Just as the pensiveness of a face signals that this head is full of language withheld … the signature of its plenitude" (*S/Z*).[36] But she also "characterizes" (if you like) the inscrutable face, and the illegible defendant haunting the legal imagination. The blind spot of the theatrical event as of the legal, Vittoria is the non-compliant textual component which intimates the distinction between transparency and translucency in reading relations. Transparency is the comfortable fiction where the inward is already, always legible. The translucent subject, on the other hand, is obscure enough to call for explication but possesses an enigmatic abundance that invites a reading process, albeit one that has to work at once against manifest sense and against the vilifying fantasy of absolute and falsifying opacity.[37] Thus she is a challenge to the temptations of facility that legal interpretation is vulnerable to: the literary-rhetorical texture of her being is the precise instrument for forging a hermeneutic model that eschews such denial of radiant darkness. Visible signs are shown to be capable both of being false, superficial, or manipulable, *and* a productive means for wresting inward signification and the relational self. Semiotic waywardness prompts questions about the relation between the irreducible surplus of *presence*—which can be an alternative episteme, and the manipulation of the legible surface—which frustrates epistemic desire.

p. 371 Legibility, however, is the other side of representability. While theatrical presence has radical rhetoricity inbuilt, that very awareness can also intimate the depth of pathos in a lack of devices to make the inward visible. Judicial structures of experience can put such expressive impotence under the spotlight. Such is the tragedy of the imprisoned Anne's actively repentant conscience in *A Warning*:

> …were my breast transparent,
> That what is figured there, might be perceiv'd,
> Now should you see the very image of poore
> And tottred ruines, and a slaine conscience …[38]

Anne finds no access to what Pulton, with epistemological confidence and semiotic innocence, called "visible tokens." In contrast to Lucrece who fears the light which "will show charactered in [her] brow/The story of sweet Chastity's decay" even to "the illiterate" who cannot decipher "learned books" (ll. 807–811), Anne despairs at her authorial failure at charactery to make her spiritual conversion legible. The limits of visibility here are a mimetic index of the invisible theatre of the heart. It is almost poignant that this final irony is enabled by the very "straightness" of the providentialist genre which assumes, necessarily, a theory of commensurate expression of the inward in the outward but grants no representational agency to human subjects; so Anne's attempts to make her false innocence manifest are as doomed as her yearning to make her repentance evident, for in the theater of God's judgments, God is the one and only maker of signs. As the second Lord exclaims in the courtroom, before questioning her self-fashioning with the help of a rose, "the case" is always "too too manifest" (2309–2310). What the prison scene stages, then, is the unstageability of the penitent mind: but that in itself gives the character a depth that is not ontologically dissimilar to the interiority that glimmers through Vittoria's triumphant staging of the enigma of the self in the face of—and elicited by—the hermeneutic efforts of institutional law. This final point is only to widen our sense of the ways in which law's encounters in Renaissance drama create, variously, a seam at which faces, bodies, selves, and texts are shown to play and play out their games of knowledges, defying not only judicial but also, at times, performative intent with a live, intractable core; a means of reconceptualizing the relation between the illegible, the unexpressed, and the inexpressible.

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Notes

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1 William Shakespeare, *The Rape of Lucrece*, ll. 1312–1313, in *The Riverside Shakespeare*, ed. G. Blakemore Evans (Boston: Houghton Mifflin, 1974), 1722–1744, 1737. All references to Shakespeare's works are to this edition unless otherwise specified.

2 See Ellen Spolsky's chapter, "The Gap Between Fairness and Law: *Hamlet* and Equity from a Cognitive Perspective," in this volume.

3 Ferdinando Pulton, *De Pace Regis et Regni* (1609), 184v–185. For other legal references to this assumption, see J. H. Baker, *The Legal Profession and the Common Law: Historical Essays* (London: Hambledon, 1986), 286–287.

4 See James Fitzjames Stephen, *A History of the Criminal Law of England*, 3 vols. (London: Macmillan, 1883), I: 341 on denial

of the benefit of counsel to those accused of treason; cf. Joseph Chitty, “Of Assigning Counsel,” in *A Practical Treatise on the Criminal Law* (London: Valpy, 1816), 4 vols., I: 407–411, 407. On the asymmetries of power and knowledge entailed in a denial of counsel to the defendant in Tudor and Stuart State Trials, see Baker, *Legal Profession and Common Law*, 287.

5 The Life of the Valiant & Learned Sir Walter Raleigh knight. With his Tryal at Winchester (London: B. Shirley and R.Tonson, 1677), p. 114/sig. H1v.

6 R. v. Udall (1590), 1 St. Tr., col. 1282, as quoted in John Baker, *Collected Papers in English Legal History*, 3 vols. (Cambridge: Cambridge University Press, 2013), II:1051, n. 138. See also J. H. Baker, *An Introduction to English Legal History*, 4th ed. (Oxford: Oxford University Press: Oxford, 2007), 509–511, 510.

7 *Reports from the Lost Notebooks of James Dyer*, 3 vols., in *Publications of the Selden Society Vol. 110,* ed. J. H. Baker (London: Selden Society, 1994), II: 407. I am grateful to John Baker for pointing me in the right direction. In his published work, Baker dates the origins of the working assumption of the unreliability of hearsay evidence to 1670 (*Introduction*, 510, n. 50); but he has, in recent private correspondence, corroborated my sense of its sixteenth-century inception, dating back to these earlier objections.

8 Ibid., I: 168.

9 Frederick W. J. Koch, “The Hearsay Proof’s True *Raison d’Être*: Its Implication for the New Principled Approach to Admitting Hearsay Evidence,” *Ottawa Law Review* 37 (2005–2006): 249–289.

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11 J. M. Kaye, “The Early History of Murder and Manslaughter, Part II: Wilful Murder of Malice Prepense: the Final Settlement of the Distinction Between Murder and Manslaughter,” *Law Quarterly Review* 83 (1967): 569–601, esp. 584, and 600–601.

12 See Thomas A. Green, “Societal Concepts of Criminal Liability for Homicide in Medieval England,” *Speculum* 47 (1972): 669–694 (669).

13 Koch, “Hearsay Rule’s True *Raison d’Être*,” 245, n. 20.

14 Reproduced by kind permission of the Syndics of Cambridge University Library: Cambridge University Library (hereinafter CUL), V.C. Court III.5, items 66, 67a, and 68.

15 CUL, V.C. Court. I.3, 112v.

16 CUL, V.C. Court I.3, 120r.

17 This resonates with the notion of credibility at law as a legal fiction, “a legal term of art,” while being, ostensibly, a means of fact-finding, in Julia Simon-Kerr’s chapter, “Uncovering Credibility,” in this volume.

18 John Webster, *The White Devil*, ed. John Russell Brown (Manchester, U.K.: Manchester University Press, 1996). All references are to this edition.

19 “Cultural intuition” is the term Simon-Kerr uses in her chapter, “Uncovering Credibility,” to analyze the social presumptions used by credibility doctrine, sometimes efficiently but at other times with grievous injury to the truth.

20 E.g., the English Ambassador’s response at 107, 140, and 181–184 (as opposed to the French). On the possibility that his moderate response to her case inscribes the value given to equity in the English system, see Ina Haberman, “ ‘She Has That in Her Belly Will Dry up Your Ink’: Femininity as Challenge in the ‘Equitable Drama’ of John Webster,” in *Literature, Politics and Law in Renaissance England*, ed. Lorna Hutson and Erica Sheen (London: Palgrave Macmillan, 2005), 100–120, where she reads Vittoria’s triumph as an ethical challenge to the legal institution, and a “moral victory” (110).

21 Sir Thomas Overbury (and others), *Characters (A Jacobean Miscellany)* (1622), ed. Donald Beecher (Ottawa: Dovehouse, 2003), 90. All references are to this edition.

22 Cicero, *De Oratore*, 1.11.36.

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24 Overbury, *Characters*, 270–271 and 271–272.

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26 Jeremy Bentham, *Theory of Legislation*, Vol. I, trans. R. Hildreth (Boston: Weeks, Jordan, 1840), 131, n.

27 Clifford Geertz, “Deep Play: Notes on the Balinese Cockfight,” in *The Interpretation of Cultures* (1973) (London: Fontana, 1993), 412–453, 440.

28 Ibid., 444, 445, 444.

29 Julia Simon-Kerr’s chapter, “Uncovering Credibility,” in this volume.

30 J. W. Smeed, *The Theophrastan “Character”: The History of a Literary Genre* (Oxford: Clarendon Press, 1985).

31 See Haberman, “She Has That in Her Belly,” for a provocative example.

32 On the functions of the jury and the changes to it, and their relation to the culture of equity, see Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200–1800* (Chicago: Chicago University Press, 1985); Julius Stone, *Evidence: Its History and Policies* (Sydney, Australia: Butterworths, 1991; Barbara Shapiro, *A*

Culture of Fact; England, 1550–1730 (Ithaca, NY: Cornell University Press, 2000), 11–13, on the commensurate importance of witness testimony and jurors' assessment of "facts." See also Subha Mukherji, *Law and Representation in Early Modern Drama* (Cambridge: Cambridge University Press, 2006), 3–4; and Lorna Hutson, *Invention of Suspicion: Law and Mimesis in Shakespeare and Renaissance Drama* (Oxford: Oxford University Press, 2007), passim.

33 Ben Jonson, *Volpone or the Fox* (1962), ed. David Cook (Bungay, U.K.: Methuen & Co., 1984), I.i.271–272.

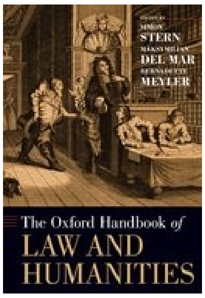
34 On Webster's legal education and background, see Muriel C. Bradbrook, *John Webster: Citizen and Dramatist* (London: Weidenfeld and Nicolson, 1980), 1–46. On "moots," see Wilfred Prest, *The Inns of Court Under Elizabeth I and the Early Stuarts, 1590–1640* (London: Longman, 1972), chs. 6 and 7, esp. 117–119. On the importance of "invention," "wit," and "memory" in these exercises, see ibid., 117; and Theodore Plucknett, *Early English Legal Literature* (Cambridge: Cambridge University Press), 80–90. For surviving notes from these readings, see J. S. Ringrose, *Catalogue of English Legal Manuscripts in Cambridge University Library: With Codicological Descriptions of the Early MSS*, ed. J. H. Baker (Woodbridge: Boydell Press, 1996). See William Dugdale, *Origines Juridicales*, 3rd ed. (London: Wilkinson, 1680), for a discussion of the rhetorical purpose of this practice.

35 Peter Goodrich, "Law," in *Encyclopaedia of Rhetoric*, ed. T. Sloane (Oxford: Oxford University Press, 2001), 417–426, 422.

36 See Roland Barthes, *S/Z Essai* (Paris: Èditions du Seuil, 1970), 204–205 (my translation). For an English rendering, see *S/Z: An Essay*, trans. Richard Miller (New York: Farrar, Straus and Giroux, 1974), 216–217, 216.

37 On a brilliantly suggestive argument about the "radiant obscurity of narratives," in the context of parable, see Frank Kermode, *The Genesis of Secrecy: On the Interpretation of Narrative* (Cambridge, MA: Harvard University Press, 1979), passim (47).

38 *Warning*, 2654–2657.



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CHAPTER

20 The Gap Between Fairness and Law: *Hamlet* and Equity from a Cognitive Perspective

Ellen Spolsky

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Abstract

This chapter explores the gap between the abstract ideal of fairness and the bodily materiality of retribution. The aim is to suggest how embodied versions of current cognitive science afford a helpful way of talking about the breach between abstractions, or thoughts of fairness, on one hand, and the judgments and punishments produced by actual legal systems on the other. It turns out to be remarkably easy for creatures with brains like ours to leap over the gap, to close the rift produced by evolved brain physiology between abstractions and their physical manifestations. The cognitive theory engaged here is the hypothesis that the grounds of morality and social decision-making—both the feeling of fairness and the institutionalized court systems—can be understood as produced by the structures and processes of human brains in their bodies. My inquiry rests on the co-occurrence of the highly popular revenge tragedies of late sixteenth and early seventeenth century (such as *Hamlet*) and the conflicts and arguments over the authority of the Chancery, or Equity Courts in London. Was equity, as John Selden later called it, “a roguish thing” that simply reflected the chancellor’s own feelings, in which case the judgments of the court were “above the law,” or was it, as Saint German claimed, grounded in sinderesis, the human mind’s natural understanding of right? The performances of revenge on stage, it is hypothesized, may have helped their audiences understand the direction of change that was needed.

Keywords: fairness, justice, equity courts, sinderesis, Hamlet, revenge tragedy, social contracts, embodied cognition, cognitive cultural study

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THE Hebrew prophet was clear—justice is balance:

> As thou hast done, it shall be done to thee.

> Thy deeds shall return upon thine own head.
>
> (Obadiah 1:15)

The arrangement of the prophet's words displays the reciprocity he asserts: As *thou* hast *done*, it shall be *done* to *thee*. But wait, the meaning is not exactly ABBA. The first line speaks in abstractions, but the second adds an active bodily threat. The same almost-equivalency appears in Abraham Lincoln's second inaugural address of 1865: his rhetoric is prophetic, expressing the wish "that this mighty scourge of war may speedily pass away." But he too threatens that God might intend something explicitly material:

> Yet, if God wills that [this war] continue until all the wealth piled by the bondsman's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be paid by another drawn with the sword …

and then, from blood, lash, and sword, Lincoln moves back, citing the moral abstraction from Psalm 19:

> as was said three thousand years ago, so still it must be said "the judgments of the Lord are true and righteous altogether."

Picking at the open wound, as it were, this chapter explores the gap between the abstract ideal of fairness and the bodily materiality of retribution, a gap that the rhetoric of these examples occludes, but that peeks through their images. My aim is to suggest p. 374 ↳ how some current cognitive science affords a helpful way of talking about the breach between abstractions, or thoughts of fairness, on one hand, and the judgments and punishments produced by actual legal systems. What the examples above demonstrate, first of all, is how remarkably easy it is for creatures with brains like ours to leap over the gap, to close the rift between abstractions and their embodiments, to use them both together, and, apparently, to understand them as parallel.

But there is a fissure between abstract and concrete in the social contract of laws, a gap that has been noted at least since Aristotle's *Ethics* (V:10, fourth century BCE). The gap is inevitable for two reasons. First, because laws must always be articulated as generalizations, but individual situations are concrete, and so if judgments are to be fair in practice, the law must sometimes be bent to accommodate the specifics of a case. Second, since the fairness of a judgment is so centrally an issue of morality, any individual's unique difficulty or guilt can only be fairly judged when the intention is recognized, and intentions are rarely if ever transparent. Early modern jurists in England struggled with the issue of how or even whether the common law could produce satisfactory fairness while applying inherited norms to the many unprecedented situations that came to the courts. They knew that what they called "conscience" had somehow to be taken into account. In sixteenth- and seventeenth-century London, the proceedings of the Chancery court, also called the court of equity, attempted to meet these difficulties. There, in principle, mismatches between law and fairness were adjudicated. Contemporaneously, during the reigns of Elizabeth and James I, conflicts between the two were publicly and frequently thematized in popular revenge tragedies. It is not unreasonable to surmise that the staging of revenge—and all those dead bodies on the stage at the end—were somehow connected to audiences' awareness of the legal system's failure to meet the demand for fairness. I would claim, further, that these plays were not only a performance of a significant social problem but also an attempt to sound an alarm, to call attention to a problem. The continued popularity of the revenge genre to this day, furthermore, suggests that a solution remains elusive. And the reason that the problem hasn't gone away, and probably isn't going to, is that it is a consequence of a gap between our evolved brain structure which allows motives to be hidden (and this lack of transparency is otherwise quite serviceable) and the social contracts that we depend upon to structure civic life. My discussion of the gap between law and fairness, here, triangulates among evidence from Shakespeare's most famous revenge play, *Hamlet*, from early modern discussion about equity law, and from relevant cognitive theory.

20.1 Morality Is Social and Neurological

Neuropsychologists Keith Yoder and Jean Decety have recently brought the study of neural circuits to bear on attempts to describe the minds of judges, juries, and the accused, in criminal trials, beginning from the assumption that “humans care deeply about p. 375 ↳ morality and create institutions, such as criminal courts, to enforce social norms.”[1] The goal of their work is to discover biomarkers of typical and atypical neural processing concerning issues of social morality that might be used to judge whether people whose brain processing is demonstrably atypical could be held legally responsible for their actions. Crucially, the empirical work they cite does not turn away from the importance of intentionality, difficult as it is to manage in an empirically satisfying way. They begin by noting that “social decision-making relies on Theory of Mind, [i.e.,] the capacity to attribute mental states such as beliefs, intentions and desires to oneself and others. … Social decision-making is also … constrained by social norms and associated punishments.”[2] Converging evidence, they further note, “indicates that the components of social decision-making rely on the coordination of multiple neurocognitive systems which support domain-general processes such as stimulus valuation, perspective-taking, mental state understanding, and response selection.”[3]

In their attempt to cover all bases, however, the neuroscientists fail to recognize the distinctions among legality and innate and culturally elaborated notions of fairness. They seem to assume, unjustifiably, that neural processes actually produce the outcomes scientists theorize them to have evolved to produce.

20.2 Folding in Theory of Mind and Embodied Cognition

From a cognitive-evolutionary point of view, being able to tell what another person is thinking or planning is clearly an advantage for survival, so it is no surprise that human minds have evolved what cognitive scientists Premack and Woodruff called Theory of Mind (ToM), and Simon Baron-Cohen called mindreading.[4] To have a ToM is to assume that others have minds like your own so that you can, by observing the eye and body movements of others, and/or by thinking about what you would do in similar circumstances, infer their otherwise hidden beliefs, desires, emotions, and intentions. Cognitive literary critic Lisa Zunshine describes our hunger for access to the minds of others as virtually insatiable: “Our social life is a constant negotiation among what we think we know about each other’s thoughts and feelings, what we want p. 376 ↳ each other to think we know, and what we would dearly love to know but don’t.”[5] Zunshine also points out that no matter how often we are wrong in our assessments about what is in others’ minds, we simply can’t turn off our expectations that we can penetrate another’s thoughts.

Literary plots frequently build on mindreading failures. Not only revenge plots, but romances, spy, mystery, and Bildungsroman narratives as well are driven by what Zunshine calls a dream of transparency and the troubles caused by mistaken assumptions about the contents of others’ minds. Hamlet needs to know whether to trust the Ghost’s claim that his uncle Claudius is “the serpent that did sting thy father’s life [and] now wears his crown” (1.5.39–40). After moaning and fuming in the opening act, Hamlet contrives a plan. Tasked by the ghost to revenge his father’s “foul and most unnatural murder,” he decides to test the truth of the accusation—“to make murder speak.” He arranges an entertainment for the court in which a troupe of visiting players will enact a murder as the ghost described it, pouring poison in the sleeping king’s ear. Since, as Hamlet soliloquized earlier, “one may smile and smile and be a villain,” his plan is to make the body of Claudius reveal the guilt he would want to hide. He will read Claudius’s physical reaction to the play as evidence:

> I have heard
> That guilty creatures sitting at a play

> Have by the very cunning of the scene
> Been struck so to the soul, that presently
> They have proclaimed their malefactions:
> For murder, though it have no tongue, will speak
> With most miraculous organ: I'll have these players
> Play something like the murder of my father
> Before mine uncle, I'll observe his looks,
> … If a' do blench
> I know my course. … The play's the thing
> Wherein I'll catch the conscience of the king.
>
> II.ii.592ff

While Hamlet hopes to "catch the conscience" of the king, Claudius has an equally serious interest in uncovering whatever thoughts Hamlet may be hiding behind the pretense of "an antic disposition." To this end Claudius also plays stage director, casting Ophelia, Polonius, and Gertrude in small set scenes, hoping to provoke Hamlet into revealing his state of mind. Furthermore, he has summoned Hamlet's friends, Rosenkranz and Guildenstern, and asks them to plumb Hamlet's intentions. He tells them "I like it not, nor stands it safe with us/ To let his madness range."[6] The five acts of the play, thus, are a p. 377 ↳ cat-and-mouse game, between the "two mighty opposites" each needing to save his own life by being the first to trick the other into revealing hidden intentions. Note here that the theater itself is working the same trick. As audiences watch the players learn what is in the minds of the characters by recruiting the normal activity of their ToM and embodied cognition, audiences too are drawn into an understanding of the tragedy of the action of revenge by inferring parallels between the actions on stage and their own proprioception. Remembering that minds are also body, psychologist Eleanor Rosch describes a chain of causality: "[Embodied] cognition … depends upon the kinds of experience that comes from having a body with various sensorimotor capacities, and these individual sensorimotor capacities are themselves embedded in a more encompassing biological, psychological, and cultural context."[7]

Recent advances in neuroimaging techniques help us see ever more clearly that what we think of as mental decision-making is significantly parallel to the other dynamic processes that keep bodies alive and functioning. Bodily processing grounds all our knowledge, producing even those abstractions we think of as conceptual, from a base of sense experience. The philosopher Mark Johnson describes the linkage:

> Our reality is shaped by the patterns of our bodily movement, manipulation of objects, the contours of our spatial and temporal orientation, and the forms of our interaction with objects. It is never merely a matter of abstract conceptualizations and propositional judgments. … The structures of our bodily experience work their way up into abstract meanings and patterns of inference.[8]

Evolution preserves successful arrangements from less to more complex life systems. There is a parallel progression from concrete to abstract, from the structure and function of individual cells, scaling up from cell physiology to the arrangements made for living in social groups that structure interpersonal interactions and becoming less automatic and increasingly complex. Both legal systems and literary forms, according to this view, are examples of culturally constructed social contracts, each a set of abstractions arising from bodily needs and possibilities and answering to the needs of individual and group survival. The bodies of theater-goers, according to this view, cannot help responding to, almost as if echoing, the actions of the bodies they see on stage or screen. Watching *Hamlet*, they see two men suffering in their need to guess what is on the other's mind so that each can appropriately produce his own actions. Revenge is the word often used as a label for this echo, for this feeling that an action, as Lincoln warned, must be produced in response to the action of another. As Hamlet famously declares: "The time is out of joint, O cursed spite!/That ever I was born to set it right! (I.v)

p. 378

20.3 The Court of Equity—To the Rescue?

But revenge, in *Hamlet,* is not just a personal problem. Not only the opacity of Claudius's mind but also the social contract of kinship and the inheritance of monarchy is at stake. Though Claudius may be guilty of murdering his brother, he is now king, and as such, the source and chief enforcer of the kingdom's laws. But Claudius is not likely to judge and punish himself, and thus even when Hamlet is satisfied of Claudius's guilt, he recognizes that he, "the son of a dear father murdered" (II. ii. 587), as he describes himself, must be the agent of justice, must act, not merely "unpack [his] heart with words" (589). He must, as revengers always say, take the law into his own hands. No mere words, and not the abstractions of the legal system, can help in a situation that we would now call extenuating circumstances. Hamlet is forced into a regression: he must stop talking and use his own body to obtain justice, because he cannot trust the law to do so. The gap between law and justice has forced itself upon him.

Revenge plots display just those contingencies that the early modern legal system was trying to manage via the Chancery, or equity court, and it sort of worked. Similar situations off stage, in early modern London, were not necessarily tragic. The equity court allowed "judicial discretion" to devise solutions that had no precedent (and produced none), in cases where it appeared "just and convenient."[9] In sixteenth-century arguments about this very problem it is clear that jurists knew that there had to be an embodied component to judgment, and that it had somehow to be accommodated even within a system that was, in principle, abstract, a system necessarily framed without consideration of contingencies. Loopholes must be devised for odd cases, those that in simpler times had would have been answered by an appeal to a chief or a ruler for arbitration and mitigation.

The chancellor, in Tudor England, as the keeper of the great seal, was charged with bridging the difference between law and "fact," as they called it. Fact meant taking individual bodies into account, and this meant recognizing what was in peoples' heads, which is why the Chancery court was referred to as the court of *conscience*. The difficulty here, as Hamlet experiences it, is that knowing what is in another's head can never be more than a best guess. But taking embodiment, that is, idiosyncratic facts into account has the advantage of providing a valuable flexibility from the point of view of the system of law itself. According to John Baker, this flexibility defended the common law itself, kept it reliable, as it were. To see how this dynamic worked, we have to flesh out the notion of common law as a social contract, comparing it, for example, to the systems of kinship, or of language, or of money, all of which evolve universally but in response to local circumstances. These contracts function with maximal efficiency when they are ↳ p. 379 recognized, consented to, and relied upon throughout the community. Although, in fact, they all self-adjust constantly, it is important that they be perceived within the group as unchangeable, even better, as "natural." Common law needed to be widely known and unquestioned. Everyone must assume that people who break the law will be punished, period. The existence of the equity court kept awkward cases out of the common law court, thereby keeping it uncontaminated by the contingencies of real life. And this was indeed helpful in early modern London as the complications of advancing modernity in many areas raised new kinds of problems that the inherited system couldn't handle. In this exemplary case, decided by Elizabeth's chancellor, Sir Thomas Egerton, you need to know that according to the common law a woman's property passed to her husband at marriage. Here is a record of his decision in equity:

> If a widow, for the advancement of her child or kinsman in blood, do give a lease or make a bond or give goods and after[ward] takes a husband who knows not of this gift, my lord [keeper] [Sir Thomas] will not withstanding uphold the gift for the considerations sake being natural affection.

> But if a widow do contract marriage with any man, and before consummation thereof, do secretly assign leases [or] make bonds or deeds of gifts to the end to deceive her new husband thereby, this by no means my lord [keeper] likes.[10]

Egerton, the chancellor, with the plaintiff before him and able to be questioned, based his judgment on what he thought of as conscience. The law would have unequivocally cancelled her gift, but on his assessment of her good faith, her “natural affection” and the absence of desire to deceive, he decided that she was in legal difficulty but had, as it is still called, “clean hands”: no intention to deceive.

It was argued by others, however, that a law that can be ignored on the basis of what a judge felt to be the thoughts, feelings, beliefs, or intentions of individuals is no law. What could guarantee, it was asked, that the chancellor didn’t misjudge the honesty of the plaintiff? Perhaps he felt ill or tired that day and wasn’t thinking as clearly as he might. Did the greater harm lie in denying justice at common law where harm will clearly be caused, or in the equity court, where harm would occasionally be caused unwittingly?

20.4 But We Try

In the contemporary discussion, conscience was thought of as a feeling, sensed as bodily knowledge, a judgment, hard to ignore, though hard to articulate to the satisfaction of others. A judgment of conscience is what Hamlet depended upon in assessing Claudius’s reaction to the play-within-the-play. A philosophically strenuous view of knowing, however, would not consider this intuitive surmise to be the kind of knowledge a court should act upon. Although we are often wrong in guessing what’s on others’ minds from observations of their behavior, now, as then, we keep trying to understand others’ thoughts, beliefs, and intentions, and we act, when we have to, on what we consider knowledge when and because we simply haven’t got anything better. So even though there is a vast difference in how people understand or don’t understand others—depending on their own abilities, training, and interests, and also on their familiarity with those they aim to understand, I’d say we have to admit that overall, we’ve hit a biological limit; we resort to guesses even in the best of circumstances. Nevertheless, we want our legal system to be at least as sensitive as we think we can sometimes be, and we want it to produce fairness *and* justice.

20.5 Fairness and/or Justice—From an Embodied Perspective

Here is one way of thinking about how embodiment impinges on what we want to consider cognition or knowledge. Babies, when learning to walk, will stand, lift a leg, and tip over repeatedly until they learn to balance on two feet. One way to describe what is happening is that they are learning to predict. They learn to recognize what *im*balance feels like in time to correct for it. Standing on two feet, walking, and thriving will depend, throughout life, on constant watchfulness and on the ability to perceive an unstable posture—one’s own, or that of one’s enemy—and thus to predict a situation that needs to be corrected for, or taken advantage of, crucially, in good time.[11] Victor Smetacek suggests a progression: we learn to balance from an awareness of imbalance, and build on that. The ability to discern the difference allows, on his view, an awareness (for example) of relative weight and measure—this stone is heavier, this one larger. This sensitivity to relative weights and measures becomes an abstraction of value learned early and without explicit instruction: siblings don’t have to be taught to gauge who has been given the largest helping of ice cream. Crucially, then, it is the sensitivity to imbalance that is important because it produces attempts to correct. Smetacek builds on that foundation: “imbalance captures attention, be it fear of falling, the mental struggle to balance an equation, or the moral urge to right an injustice.”[12] This fits Johnson’s view; the embodied sensitivity to imbalance scales up to an understanding of balance and of fairness, and an understanding of fairness leads (eventually) to the development of legal systems.

p. 381 The body's self-knowledge, then, its proprioception, grounds our ability to produce abstractions and abstractions upon abstractions.[13] Furthermore, the movement from embodied knowledge of concrete sense data to abstract concepts is a two-way dynamic—a toggle switch, affording human minds the ability to move back and forth easily, turning one into the other. Hamlet has decided to observe his uncle watching a play because he counts on his own body-reading ability to translate what he observes of his uncle's body directly into the abstraction he labels "guilt." Theater audiences are also body-reading, of course, but they have some extra information: they know themselves to be within another social contract—the contract of the literary genre. They assume, in the theater, that the playwright has given them enough information to turn what they hear and observe into an understanding of the characters' emotions, beliefs, and intentions.

We hear Hamlet's soliloquies, for example, as if we were overhearing him speak his own mind—honestly, we assume. And indeed in the opening acts he does well enough expressing his situation. In the play's final act, however, there is less talk and more violence. The combination of Hamlet's emotions and the impossible legal situation pushes him toward action, which Smetacek's view of embodied progression allows us to describe as a regression. The play recruits the motor resonance of audience members to mirror this descent from abstraction; they too want action, want to see guilt punished, and thus although they surely recognize that the triumph of violence is tragic, the death of the bad guys in the end always satisfies. As the play progresses, Hamlet falls further and further into violence. He stabs and poisons three people in the last scene, and these are in addition to his earlier stabbing of Polonius, driving Ophelia to suicide, and arranging the murder of Rosenkranz and Guildenstern. Again and again, the moral of the story is that vengeful killings never get it right; only some of those dead in the end are actually guilty. There is a good reason social groups have formulated legal systems to replace bodily action with contracts of abstract justice.

20.6 Mysterious Workings

Christopher Saint German (1460–1540), an English common lawyer and an active polemicist defending the legitimacy of the equity court, had already proposed, by about 1530, in the middle of the reign of Henry VIII, what amounts to an embodiment theory to describe what individuals know by virtue of having human bodies. Saint German adopted the scholastic idea of *sinderesis* to provide the gap-filler needed between the
p. 382 abstract and concrete.[14] Sinderesis is an awareness of the law of God in every conscience, ↳ he tells us, assuring that every person can distinguish good from evil. His argument rescues the claim for the reliability of the chancellor's judgments of conscience by inserting this fixed center. It has the further advantage of tying the equity courts to common law by the claim that sinderesis is an internal part of all law because it is an internal part of all men. Here is his claim: "Sinderesis is a naturall power *or motive force* of the *rational* soule sette *always* in the hygest parte therof/ mouynge and sterrynge it to good/ & abhorrynge euyll. **And therefore sinderesis neuer syneth nor erryth** ***nor does it err in respect to the fundamentals of speculation.***)"[15]

Elsewhere he calls sinderesis not only a power but a "virtue;" like a spark from a fire, or like an angel, it is "*a fragmentary participation in intelligence*." Then we learn that "this sinderesis our Lorde put in man to the intent that the ordre *and connection* of thynges shuld be obseruyd ... without serchynge of reason." It is not only innate—and this is the crucial step—it is universal, entirely reliable, unquestionable by reason, and "maye not hollye be extyncted neyther in man ne yet in dampned soules."[16]

The short section in which Saint German explains this "power" is probably ignored by modern scholars not only because of its prima facie spuriousness but because it doesn't add to the idea of conscience as it was understood by Saint German's contemporaries, nor does it clarify it further. It is important in the discussion here, however, because it shows Saint German producing an embodied grounding for an abstract idea. Having noticed the gap between the sense experience of a token and the conceptual understanding of it as an example of a type, he found the idea to be a deus ex machina that suited his purpose well. As Saint German argued, because this “spark” is innate, universal, and reliable, the act of inviting “conscience” (as equity) into the judicial process does not simultaneously invite idiosyncrasy. Sinderesis will guarantee that good men always arrive at the same judgments of truth.

Justifiably, however, the existence of heretics bothered Saint German. The evidence that Catholic martyrs were willing to die for what he as a Protestant understood to be error presented him with a counterexample that he had to work to discredit. He recognizes and acknowledges that “when they dye for the wyckydnes of theyr erroure [they] byleue that they dye for the verye trouth of the faythe.” Saint German thus admits that the power of sinderesis may be hindered “eyther thorughe the darkenesse of ygnoraunce/ or for vndyscrete delectacyon/ or for the hardnes of obstynacye.”[17]

Not ready to give up, Saint German explains that if sinderesis is “hindered in its clear view of good and evil,” as it apparently was in the Catholic martyrs, a back-up system is activated. Here the argument becomes even fuzzier as he conjures further bodily evidence to maintain that every individual knows the p. 383 difference between good and evil. ↳ Sinderesis, we learn “*has another function* [way of acting], *namely murmuring against the pain of punishment which is very strong in the damned …* so that they suffer for synne.”[18] He seems to be implying that if the supposed heretic were not in fact a heretic, he would not suffer the pain of his punishment. Either this means that God wouldn’t have allowed the heretic to be tortured or burned if he were not sinfully clinging to mistaken doctrine, or it means that an honest martyr, while being tortured or burned, wouldn’t feel any pain. Either way, Saint German sees pain itself as a message to a person’s reason, indicating error. He is clearly committed to maintaining the unbroken connection between a bodily manifestation that can be seen by others—the susceptibility to pain—and the abstraction that is belief or thought, even if the explanation he produces is unclear and unconvincing. Sinderesis, even though it be hindered, is never extinct. Bodily knowledge is, as he would have learned from Aristotle, the ground of all abstract understanding: “This sinderesis is the begynnynge of all things that may be lernyd by speculacyon or studye.” A Latin addition to this paragraph claims explicitly that sinderesis is instinctual; it works before and without any acquired experience. It is a “*power constituted for assenting naturally to a practical principle … signifying in a universal manner that something is to be done or avoided. Since it is called a ‘power’ it excludes acts and acquired disposition*.”[19]

Saint German’s argument connects equity, conscience, justice, and real bodies in pain, by naming God as the guarantor of the connection between an abstract law and the entirely unabstract individual who stands before a judge. It is evidence that this thoughtful judicial theorist recognized and felt the need to think about that very anxiety about the misfit between abstract legal principles and unique circumstances that the revenge plays display. His affirmation of God as the source of the power to connect the dots distinguishes his view, of course, from the thorough materialism of today’s cognitive science. Saint German was no skeptic and was not prepared to recognize the human failure that Shakespeare expresses at the end of *Hamlet.* After Hamlet’s death, Horatio’s promise of clarification does not augur the satisfaction of retribution but rather a narrative of chaos. He will report, he says, on “unnatural acts, of accidental judgments, casual slaughters, of deaths put on by cunning and forced cause, and, in this upshot, purposes mistook” (5.2.379–382).

If Hamlet is prompted to revenge by the natural law that binds a son to love and obey his father, so was Henry VIII’s chancellor Cardinal Wolsey (whom Saint German was interested in defending) bound to deliver correct judgment by a God-given spark of right conscience. Hamlet’s end is tragic, however, and so was Wolsey’s. Historians have not usually felt the need to defend the Cardinal, chancellor from 1515 to 1529, and chief judge in equity who was widely believed to be susceptible to bribes and flattery. A churchman not trained in law, Wolsey seems to have enjoyed showing contempt for it and for common lawyers by the p. 384 arbitrary exercise of his power. Baker ↳ assumes that Wolsey’s successor, Thomas More, must have been thinking of Wolsey when he argued that without consistent application of law “judges will be useless, or they will rule as their own nature leads and order whatever pleases them in which case the people will be in no wise more free but worse off, in a condition of slavery, since they will have to submit, not to settled and certain laws, but to uncertain whims changing from day to day."[20]

More's analogy to slavery is apt: the life of a slave is lived without fixed law. He must act according to the whim of his master who has no obligation to be consistent or fair in his demands. Note, however, that the life of the revenger is analogously lawless, but the revenger chooses the path of bloody hands while the slave has no choice.

The learned controversy over the justification of the separate jurisdiction of an equity court continued for almost a century after Saint German's treatise, with the day-to-day efficiency and honest functioning of the court, according to Louis Knafla, depending on the administrative abilities and honesty of the individual chancellors.[21] Eighty years later, the theoretical problem remained. John Selden, a parliamentarian and an active public intellectual until his death in 1654, is quoted in *Table Talk* as describing the difference between law and equity this way:

> Equity is a roguish thing: for law we have a measure, know what to trust to; equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure we call a foot, a chancellor's foot; what an uncertain measure would this be? One chancellor has a long foot, another a short foot, a third an indifferent foot: 'tis the same thing in a chancellor's conscience (1689, 46).

Selden may have had personal experience with the judgments of chancery men who did not seem to be anchored by sinderesis, but he recognized that even an honest chancellor judged according to his own conscience, as did the revenger. Further, the casual use or none of precedent in the equity court was at least as damaging as the unsecured judgment of the chancellor. The justification for ignoring precedent, according to William Lambarde (1536–1601) was the necessity of keeping all options open. The judge could not be bound by past judgments, nor could his judgment be recorded for future use "because his power is singular" (1957, 40). This view opens a window onto an additional cognitive dilemma: the equity judge was not required to learn from experience. The lackadaisical record-keeping at the time would surely have caused idiosyncratic and unpredictable judgments, even when the judges were honest. To give up on the generalizable experiences of others—the old "saws of books … all pressures past" (I.v.100 ff) that Hamlet p. 385 tosses out after meeting the ghost—is to deprive the brain of its most natural ↳ way of learning, namely, by building abstractions or categorizations from experience, that is, moving by analogy from a token to a type.[22]

Finally, after almost a century of argument about the problems produced by a prerogative court that is not legally constrained, the issue was settled by the king's fiat. Chancery, with its capacity to ignore or override a specific law, was declared the highest court of the land in 1616, when James I took the side of his chancellor, Lord Ellesmere, whose judgments included the explicit provision that in cases of dispute the chancellor's court was to have the final say. James dismissed his own Chief Justice Edward Coke when Coke wouldn't concede the King's (and thus the chancellor's) higher power.[23] The effect of James's action was to allow the highest court of the land to operate outside the law. If, however, we interpret James's insistence on his own supremacy as he himself understood it, then an appeal to the court at which he stood nominally at the head was not moving outside the law but was rather a resort to a higher law. King James, as God's representative on earth, with the chancellor his representative, dismissed Coke because he considered the challenge to his absolute sovereignty to be sacrilege. He insisted that the monarch simply is the law. Note the irony again: the absolutist monarch and the revenger each feels he is the only person who can provide ultimate justice.

In both the court and the revenge plot, then, an exemplary insider—Prince Hamlet or the chancellor—is actually an outlaw. In *Hamlet* this is made clear by the ghost's reference to his own "most unnatural murder" and his demand of Hamlet that he act on the natural law that demands respect for one's parents: "If thou hast nature in thee, bear it not" (I. v. 81). Extenuating circumstances indeed. In Saint German's terms, as we have seen, natural law being the more primitive kind of justice, Hamlet is asked to give up on conceptual and logical thought and return to a physical way of solving problems. In these plays, the madness of the revenger, whether put on or real, is a sign of his abandonment of trust in reason, an unmooring from established systems of law. The horizons of justice have contracted and are now limited to the natural justice—to the fairness, but not the legality—of answering violence with violence. The plays introduce an unexpected and unbalancing event by an emotionally evocative spectacle of horror early on, such as the appearance of a ghost. The audience shares the shock and empathizes with the ghost's and Hamlet's pain. Any residual resistance the rational mind might have to the now-hatching revenge plot is already weakening.[24] Fairness demands that balance be restored.

p. 386 The path of the contemporary litigant in the London courts was parallel. As *Hamlet* begins from an injury or imbalance that awakens the desire for rectification, so the litigant appeals to the equity court for relief from an abusive action demanding a fair outcome—one that the impersonal machinery of the common law can't supply. The stage fakery that is involved (actors not really dead or maimed, strawberry jam for blood), parallels the sleight-of-hand Saint German describes as moving an individual to knowledge of an abstraction from a sense base: the power of what the spectators of revenge plays see carries them from the lawful world outside the theater to sympathy with an outlaw. Audiences are led to abandon rational thinking for an argument that runs through the body, either because God set us up that way (Saint German) or because as we watch a play, we not only identify with the bodies we see but also feel as if we can recognize the character's intentions, thanks to the work of our ever-active Theory of Mind, as embodied by the actor.

True justice is promised by the genre of the play, as by the equity courts, channeled from heaven through the king and his minister. On stage, as the protagonist is pulled away from whatever ideals he may have trusted—Hamlet, remember, was a philosophy student—the recognition of injustice drives him to correct it by hands instead of words. He thus works against himself, and against the best interests of Denmark which at the end of the play falls to the invading Polish prince, Fortinbras, whose name underscores the backsliding. By presenting evidence of the importance of the facts of individual bodies, of daughters and fathers, fathers and sons, brothers and lovers, *Hamlet,* and the genre of revenge drama as a whole, display and acknowledge the material human contingency that must somehow be recognized within legal systems. As the common lawyers and Chancery men argued about how to civilize, or "weed out" the "wild justice," as Francis Bacon called it,[25] of revenge, the revenge plays were simultaneously displaying the consequences of the failures of an inadequate legal system to be responsive either to law or to facts and displaying the problems produced when those failures encourage a regression to the law of strength-in-arms. If adults mostly manage to restrain the desire to perform rather than negotiate fairness, we may yet enjoy, in the theater, the simplicity of just hitting back at the bad guys. And because the revenge genre clearly labels this behavior as tragic, hope remains that eventually someone will figure out how to enact the god-like justice we can imagine but have never yet attained. The revenger, as Michael Neill says, "stands for all those … whose powerlessness puts their cause beyond the solutions of reason."[26]

p. 387

20.7 Embodied Cognition Produces Social Contracts

From here we can see how the London playwrights contributed to the work of social construction, performing and amplifying values recognized by individuals so that they might eventually become shared, social knowledge. Once widely agreed to, the norms that popular art displays might eventually have an influence on the prevailing combination of unstated contracts and written laws that allow communities to survive and thrive in a continually changing and frequently hostile world.[27] Social contracts produce and govern expectations and they work best when they are mostly fulfilled. Unwritten, and usually unspoken, they "go without saying," as do, for example, the rules of the grammar one naturally learns to speak.[28] By encouraging group members to assume that others share what they know, they produce the kind of stability that makes social life flow. They depend on neighbors inferring the intentions of others by mind and body-reading—even though it is close to impossible to mindread reliably and accurately.

Social contracts categorize and assign relative values to shared aspects of civic life and describe the rules for their interaction. They have to be able to adapt to changing circumstances, but adaptation works best when gradual and unnoticed. Think of floating currency exchange rates, and of word coinage, as ways that communities create and sanction small almost unnoticed changes that keep the larger social contracts of which they are a part functioning while not challenging their foundations. On this view, social contracts are the external parallel to bodily metabolism, keeping us alive by constant alertness to imbalance followed by homeostatic correction. The value of disorder is that it invites correction: disorder and uncertainty incubate adaptation, that is, the emergence of revised understanding, new possibilities, revised contracts.

Social contracts share the three features Smetacek described as leading, eventually to law. They begin from proprioception, that is bodily awareness, they meet embodied needs—in this case, the need for fairness—and they produce abstractions. The laws, courts, judges, their interpretations, and the community's consent to be thus governed structure one of those contracts, namely, the legal system. The abstractions produced, however, never fully break free of their bodily origins. Imagine this progression: a street brawl over a disagreement can be formalized as a duel, and formalized even further as a court proceeding. An individual body's immediate reaction to a threat can be constrained by rules of engagement, and then constrained even further by a court system ↳ arranged to use words and reason to adjudicate disputes. The legal system is one of the social contracts that citizens live with, for their own advantage, even if, in order to benefit, they have to agree to limits on their own freedom of action. The rule of law requires that we agree not to take matters into our own hands. We follow the law so we won't be slaves. p. 388

20.8 Literary Genres Are Social Contracts

As I have argued,[29] the set of genres of imaginative literature that are actively in play in a given cultural setting are usefully considered, taken together, as a social contract. Together they produce and describe the patterns that work or don't work within a community. Like the social contracts of language, money, kinship, and law, these genres comprise the set of descriptive rules that codify and govern the production and understanding of a culture's narratives. Evidence that readers use genre names in this way (i.e., recognizing them to be somehow contractual) is abundant. In a recent *Times Literary Supplement* (TLS), for example, Joseph Farrell, reviewing some examples of what he opportunistically categorizes as "the modern Italian detective novel," writes:

> An innate human yearning for justice, or for some system in secular society that will cause wrongs to be righted, undoubtedly lies behind the popularity of the crime novel. … Pundits have suggested that the genre allows readers to contemplate the violence of society safe in the knowledge that all will come right in the end.[30]

Is this reader agreeing that having a fiction of safety is better than not? Readers are surely free to guess what contribution any particular genre makes to the emotional and intellectual needs of its audiences. And the point about taking this cognitive perspective is to encourage that exploration. We might say that some literary genres, at some crucial points in a culture's history, seem to be working—or perhaps just trying to work—for the advantage of the group, and also, to the advantage of an individual who lives within it. A genre refined over time and adaptable, say, a revenge plot, may afford the time and space, within the walls of a theater, for the contemplation of issues that need communal revisionary thinking. The theater suggests a differently structured world and allows its public to pretend, or to pretend they are pretending. But who has never cried at the end of a movie or a play? There is an embodied level of seriousness even as the fictionality is recognized. As the again, equity court protected the image of the inviolability of the common p. 389 law, displays of grotesque violence in the revenge plays, resulting from the abandonment ↳ of the abstractions afforded by an ideal and functioning legal system, sound an alarm, dramatize a crisis, warn that changes are needed if the law is to function to maintain social balance within a permanently unstable world.

The cognitive perspective helps us see the embodiment that allows a social contract—in this case, the genre of revenge tragedy—to work in a dynamic relationship with the needs of its audiences at a specific point in the community's history. The stage supports the public performance of different social contracts, and even more important, displays the dangers of their failure. The revenge plays analogized the embodied concerns of their contemporary London audiences, specifically, the insecurities that had arisen in the rapidly changing demographic, religious, and economic situations of early modern England. Even, or maybe especially, when socioeconomic circumstances are in flux, stability depends on systemic adaptation, but at the same time, on the illusion, no, actually, the feeling—the bodily feeling—of stability. It is necessary for the populations' sense of security and trust in the continuance of their own well-being. The bodily base of understanding, as we have seen, appeared not only in the popularity of revenge tragedies on the stage but also in contemporary jurisprudential argument.

20.9 Conclusion: The Cognitive Perspective

The hypothesis is not that fictions in the theater reflect problems. The claim is that an embodied, enactive, cognitive theory can begin to reveal some of how these revenge plays spoke to their audiences in ways that just might initiate and encourage the rethinking that might eventually lead to change. The agency suggested is indirect and difficult to trace, but it threads through real bodies, linking the theater to the legal system and encouraging the search for evidence of functionality in a dialectic between works of imagination and their audiences. The hypothesis of agency itself rests on an assumption made by evolutionary biologists and anthropologists, and that is this: when a feature of cultural life as ubiquitous as the production and sharing of narrative fictions is recognized, apparently producing nothing more than pleasure for their audiences, and when it is then noted that these behaviors require caloric expenditure that might otherwise be used for more clearly survival-oriented activities, we may well ask how this activity contributes to the flourishing of the group.

Cognitive literary study hunts down evidence that fiction, or art, in its many forms, is worth it—is worth freeing creative artists from kitchen duty for the greater good, for the continuance of the community. These artists help at least some others recognize and use various kinds of social contracts to make life easier, to solve problems, especially when those abstractions are crucially connected to the bodies of real people. According to this view, face painting, sculptures of deities, epic poems, and the cluster of revenge plays in p. 390 early modern London had work to do. They provided those in the group who, ↳ for whatever reasons, were able to think new and possibly rebellious ideas, with a framework for playing around, a protected space from which general rethinking and change might emerge. These violent and often unrealistically grotesque plays suggested how the stuff of audiences' daily lives was connected to problems in the prevailing legal system, a system that needed to be repaired if it were to be both just and fair. I look forward to filling in the details of the cultural/biological dialect of change adumbrated here. I will begin by following up the evidence that students at the Inns of Court were great patrons of the theater.

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Notes

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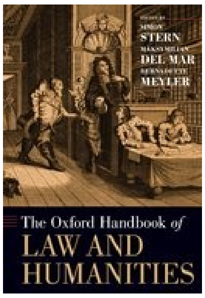

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CHAPTER

21 From Eternity to Here: Divine Accommodation and the Lost Language of Law

Nomi M. Stolzenberg

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Abstract

The discourse of religious accommodation has stopped making sense and the reason it has stopped making sense is because our terminology is inherited from a tradition of political theological discourse that has been forgotten: the theology of divine accommodation. This chapter reconstructs the content of that tradition of political theology in broad strokes, arguing that the birthplace of secularism and the birthplace of liberalism both lie here. Once we recognize that, a number of doctrinal and conceptual puzzles can be solved, including how to define religion, whether to characterize secular humanism as a religion, and how broadly to construe the right to religious accommodation. It also solves the intellectual history puzzle of how Christianity came to be "terrestrialized," paving the way for the evolution of liberal political thought. *Contra* the received wisdom that political theology and liberalism are intellectual and political antagonists, locating the origins of liberalism and secularism in the tradition of divine accommodation reveals conservative political theology and liberal political theory to be one and the same. It further reveals the centrality of law to the humanist tradition and the centrality of humanism to law.

Keywords: religion, liberalism, secularism, divine accommodation, political theology, humanism, law

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21.1 Chaos

As the second decade of the twenty-first century draws to a close, it is increasingly difficult to avoid the sense that the principle of accommodating religion is veering out of control. The problem goes beyond the granting of accommodations that rub many of us the wrong way because they carve out exemptions from laws we want to see enforced. The problem is that the conception of religious accommodation on which these claims rest is both practically unsustainable and theoretically unintelligible. We are in the presence here of not just political conflict but a deeper kind of chaos, a mental chaos that exists at the level of ideas. Political conflict over religious exemptions is to be expected when the laws from which exemptions are sought are themselves contentious. Religious accommodation claims are being used today as a political strategy by groups seeking to reverse political defeats in the context of the ongoing culture war battles over gay rights and reproductive rights. There is nothing particularly puzzling about that. What is deeply puzzling is that nobody saw it coming. And what is frankly incoherent is the picture of religious freedom on which these claims are based. Ironically, that picture is shared by both sides of our increasingly polarized political debates.

As currently pictured, the right to religious freedom confers not only rights of conscience (the freedom of belief) and rights of conduct (the freedom to act in accord with one's religious beliefs) but also, breathtakingly, rights of lawbreaking, the right not to follow the law (if it conflicts with your religious beliefs). That this amounts to nothing less than anarchism was recognized by the late Justice Antonin Scalia p. 392 in a much-maligned ↳ opinion in 1990.[1] Addressing the issue of whether two Native Americans had a right to be exempt from regulations that penalized the use of peyote, Scalia made the obvious point that treating religion as an excuse not to follow the law is "in effect to permit every citizen to become a law unto himself."[2]

Regardless of how one thinks the Native Americans' claims should have been decided (I happen to think they should have prevailed), one would think that this point by itself is unexceptionable. By definition, if people are granted the right not to follow the law when it conflicts with their beliefs, then the state devolves into a state of nature in which everyone is permitted to act in accord with their personal beliefs rather than the law, unless some meaningful limitations are placed on this right. But what looks like an unassailable point of logic today was treated in 1990, when the case was decided, as sheer hyperbole. That decision provoked a groundswell of intense political opposition, bringing civil libertarians together with religious and political conservatives to demand the passage of the federal Religious Freedom Restoration Act[3] to "restore" precisely what Scalia had rejected: a version of religious accommodation so broad and unbounded that it really does amount to a right not to follow the law whenever the law contradicts a person's religious beliefs.

This notion of religious freedom is now inscribed in other statutes and executive orders that equate religious freedom with the right not to follow government regulations that violate one's beliefs. The only check placed on this broad right to disregard the law is the "compelling interest" standard, according to which a religious exemption can be denied if granting it would undermine the state's ability to protect compelling interests.[4] This limiting principle might seem to offer reassurance that accommodation is not tantamount to anarchy. But this test is deliberately designed to be extremely difficult for the state to meet. Taken at face value, it amounts to saying that as long as the state's interests are anything less than compelling (and even very important state interests are deemed to be less than compelling), and as long as the state interest, even if it is compelling, can be pursued through other "less restrictive" means, then chaos in the form of lawbreaking can reign.[5]

The chaos created by laws and executive actions reflecting this logic is real. But, compounding the mystery of its meaning, it does not take the form of the kind of anarchy that these regulations expressly authorize. In practice, the granting (and claiming) of religious exemptions is highly selective. And, despite serious signs of disintegration, the power of the state today is in many ways stronger than ever, making it farcical to suggest it is on the verge of descending into anarchy, let alone that it is handing its power over to private citizens and authorizing its devolution into a state of nature, as a literal reading of the current doctrine of p. 393 religious accommodation implies. No, the real chaos is reflected precisely in the gaps between what the doctrine says, how it is heard, and what it does. ↳ What that reflects is not political chaos (anarchy, the absence of effective of lawmaking by the state) but mental chaos (confusion, the absence of sense-making by people). The discourse of religious accommodation has, quite simply, stopped making sense.

This is a matter that goes beyond conservatives and progressives talking past each other. It is not that we lack a common language. We *have* a common language, which none of us understands. We all continue to use the words and concepts of an inherited discourse of religious accommodation without understanding what we are really saying.

How else to explain that, when they joined forces with conservatives to bring about the passage of the Religious Freedom Reformation Act (RFRA), progressives didn't perceive that it means what it says? How to explain that conservatives feel no compunction to defend themselves from the charge of anarchism, when they are explicitly claiming the right to disobey the law? There is a political puzzle here. (How did progressives become the party of law and order, and conservatives the party of anarchy?) But that is embedded in, and muffled by, a deeper linguistic puzzle. The current discourse is the very opposite of euphemistic: it explicitly names and claims its taboo objective, but when it does so, the taboo nature of that objective dissolves, and the objective itself (to deny the state's authority) becomes unseen.

A world in which people blithely endorse what is literally a principle of anarchy without acknowledging its anarchical character, and with no real intention of dismantling the state, is a symptom of a state of intellectual and cultural chaos in which a previously established understanding of religious accommodation has broken down. This is a state of chaos that has taken hold in the domain of *thinking* about the state and religion. The state may not be collapsing into chaos, but the doctrine pertaining to it has. Not just the precepts of the doctrine, but the basic conceptual components out of which those precepts are fashioned—"religion," "free exercise of religion," "burden," "secularism"—all elude definition. Instead of guiding our collective thinking along shared channels of thought which point us toward aspects of human experience we all can recognize and agree we need to make decisions about, even if we disagree over what the decisions should be, these terms function as the vaguest of signifiers, pointing in multiple directions at once toward diverse phenomena we only dimly make out.

What has brought us to such a pass? A shorter story would trace the development of religious reactions to modernization in the realms of religion, politics, science, culture, and law. It might begin with the Christian reaction to higher biblical criticism. It might focus on the origins of Christian fundamentalism in turn-of-the-twentieth-century America, following the twists and turns of evangelical Protestants' encounters with Catholics and the emergence of a political coalition between these two erstwhile theological enemies. It might document the events that catalyzed the formation of the American "Religious Right," including the recognition of rights of gender and sexual equality and reproductive choice, and the school prayer decisions of the early 1960s, and *Brown v. Board of Education*. It might analyze the complicated forms of solidarity conservative Protestants and Catholics formed with Mormons and Orthodox Jews, and the introduction of Islamophobia into the Religious Right in the late twentieth century. It might tell the story of parallel developments in other countries in this same time period.

p. 394 But I want to tell a longer story, about the deep sources of our religious and legal vocabulary, a story that begins in the medieval period with the encounter of Jewish and Christian thought with classical ideas. This is a story that goes back to the very origins of the idea of the secular and the early theories of secular science and secular law that it spawned. As it traces the evolution of the idea of secularism and secular law, it is a story that offers us a glimpse of the origins of liberalism as well.

The story of the origins of liberalism offered here differs from other accounts. For several decades now, scholars have been excavating the theological origins of liberalism.[6] Other scholars, reviving the subject of political theology, purport to demonstrate that the modern liberal state is unable to escape its theological origins,[7] and remains, despite its liberal secular pretenses, grounded in claims to sacred authority.

Despite their radically opposed outlooks, these two bodies of literature share the recognition that the modern state evolved out of theological (specifically, Christian) traditions of thought.[8] Further, they are in agreement that liberalism is incompatible with older, theological understandings of the state, according to which the state's authority (figured variously as emergency or divine authority) is antecedent to, and overrides, law. What they disagree about is not the essential dichotomy between liberalism and the emergency state (i.e., the state that overrides and suspends the rule of law) but the possibility of there being any alternative to the emergency state (i.e., a liberal state, governed by the rule of law). According to scholars of the history of liberalism, that is not only a possibility but an actuality. In their view, the newly acknowledged religious foundations of liberal political theory do not negate its liberal character, either because they function as a kind of intellectual scaffolding, thrown away once the edifice of the liberal state is constructed, or because the religious beliefs in which liberalism is grounded do not necessitate the exercise of supralegal powers. Proponents of political theology dispute these contentions. They maintain that the religious frameworks out of which modern thought was built are not mere intellectual "scaffolding" but, rather, integral features of the modern state, and argue, further, that emergency powers are a necessary and permanent feature of sovereignty. Maintaining that the powers of the emergency state are by their nature sacred, and the state is always, of necessity, an emergency state, they draw the conclusion that the ideal of a liberal (secular) state subject to the rule of (secular) law is an illusion.

p. 395 My account agrees with the basic proposition that modern political theory derives from traditional theological doctrines. But it proposes a different view of what the content of those doctrines is. Following the lead of the historian Amos Funkenstein, it identifies the theological doctrine of divine accommodation and the "secularist theology" which grew out of this and related doctrines as the intellectual source of modern political theory and secular law.[9] This is an understanding of the origins of modern thought that has long been accepted by historians of science and religion, but which has received little attention from historians of political and legal thought, even though Funkenstein and others made it clear that the "sciences" that evolved out of secularist theology include the legal, political, and social sciences. Indeed, their work has shown that underlying all these fields of academic study was a particular theory of law (a secularist theory of law) that grew out of the understanding of the need to accommodate humans' inability to grasp divine law. That understanding, and its influence on the evolution of modern political thought, have yet to be integrated into the study of liberalism and the broader topic of religion's relationship to law and the modern state.

Once the centrality of the principle of accommodation to the modern state's theological foundations is recognized, a number of things fall into place. First, the accommodationist account provides an answer to the question which has dogged contemporary historians of liberalism, which is, to quote Samuel Moyn, not *whether* Christianity birthed liberalism but, rather, "how this happened."[10] Second, it offers an explanation of the nature of secularism which resolves the contradiction of a political theory (and conception of law) which is at once theological and secularist. Recovering the logic of divine accommodation reveals secularist theories of the state and political theology to be conjoined rather than opposing political philosophies. By the same token, it explains how secularist theories of law and the state generate liberal political doctrines which complement conservative political doctrines rather than displacing them. It points up the inherently hierarchical nature of accommodation, which mirrors the inherently hierarchical ("conservative") nature of the state, no matter how tolerant and otherwise liberal the state is. In so doing, it helps us to understand how current usages of the concept of religious accommodation, invoked in the name of defending religious tradition, ironically deviate from the original (religious) understanding of the principle.

The point of reconstructing the original understanding of religious accommodation is not to assist in a re-installation of older, religious world views. To the contrary, the logic of accommodation affirms the inevitability of a dialectical process of continual innovation both at the level of practice and at the level of the conceptual schema by which we understand, justify, and criticize our practices and institutions. More specifically, it affirms the inevitability of secularization. From the point of view of accommodationist ↳ p. 396 thought, theology *becomes* secularism, political conservatism becomes liberalism, and liberalism eventually becomes superseded into yet another synthesis of conservative (law and order, jurispathic) and humanist (rights-affirming and life-affirming) impulses. But along the way, contradiction and confusion reign. Today, we are in a moment of heightened confusion that stands to be illuminated by reconstructing the logic of accommodation.

Recovering that logic allows us to see that the words used in contemporary legal and popular discourse are relics of an archaic conceptual framework that once ordered our thinking but no longer does. Irreversible changes have been introduced into our concepts and practices which are irreconcilable with the old ways. But we have not yet arrived at a new intellectual synthesis that would charge the old words with new, coherent meaning. The words we have inherited from the older (theological) discourse of accommodation serve today as placeholders for replacement ideas, yet to be coherently formulated. Eventually, the contours of the doctrine of accommodation and the cognate principles of secular law will be reshaped. But that cannot happen until we recognize the current way of thinking about those principles no longer makes sense.

21.2 Order

In the beginning of the development of the accommodationist tradition there was chaos, to which philosophers responded by creating order and justifying that order on the basis of a particular set of theological doctrines.[11] More specifically, they were responding to the chaos created by the existence of human differences, including different beliefs about what the rules of order should be. The recognition of human differences and the need to accommodate them, and the recognition of the need for order in the face of those differences, are equally essential and inseparable elements of the accommodationist political philosophical tradition.

Before the principle of accommodation was deployed to imagine and justify particular forms of political order, it was used for a very different task: to explain away parts of the bible perceived by the safeguarders of religious orthodoxy to be inconsistent with correct beliefs about the natural and supernatural world. These textual “embarrassments” included anachronisms, anthropomorphisms used in the description of God, and approving references to practices deemed to be abominations (such as animal sacrifice). All these features of the biblical text cried out to the theologians for some kind of explanation.

Theologians found the explanation they were looking for in classical rhetoric, which formulated a principle p. 397 of textual exegesis that allowed them to explain these features of ↳ the biblical text as “accommodations” that had been made to the needs and limitations of its first audience. The classical principle of accommodation had been developed first by Greek and Roman philosophers as a hermeneutic tool for interpreting written texts, such as contracts and wills. Coupled with the principle of equity, which elevated the “spirit” of a text over its “letter,” it held that effective orators and writers tailored their modes of expression to the ability of their audience to comprehend their words. Readers of texts were exhorted to base their interpretations on a reconstruction of the original context in which the text was produced.[12]

Implicit in this hermeneutical injunction lay a mundane proposition that bore radical implications. The idea that perceptions change over time and vary from place to place, and therefore texts should be viewed as products of a particular context,[13] would eventually give rise to the modern study of history and anthropology and the percolation of those fields' perspectives into the broader culture.[14] But originally, it was simply a commonsense approach to reconstructing an author's intentions. Authors, the classical tradition maintained, know that in order to achieve their goal of being understood, they have to write in their audience's language, which is to say, accommodate their words to their audience's perspective. Recognizing that human beings' understandings are filtered through their sense of what is already familiar to them, the concept of accommodation functioned as an exegetical principle that admonished present-day readers of texts to interpret them in light of the modes of understanding that prevailed at the time they were written. At the same time, it counseled adjusting (i.e., accommodating) the original spirit of the text to the felt needs of the time.

These hermeneutical principles, first applied to secular texts, proved to be exceptionally useful for biblical interpreters seeking to defend the biblical text from the charge that it contained errors. As Funkenstein relates, "medieval Jewish and Christian exegesis shared the hermeneutical principle of accommodation: the assumption that the Scriptures are adjusted to the capacity of mankind to receive and perceive them." On the basis of this "exegetical *topos*," there developed "various explanations of the less palatable and less understandable biblical precepts and institutions," which the principle of accommodation justified as "the adjustment of God's providence to the primitive mentality of the nascent Israel."[15]

This marriage of classical rhetoric with Christian and Jewish theology was extraordinarily fecund. Not only did the principle of accommodation continue to be used to defend religious texts and doctrines from critical assaults.[16] It also became the basis for theorizing about the author of those texts. Applied to a text whose ostensible author was the supreme divine being, the principle of accommodation became much more than a method of exegesis; it became an account of the nature of the divine being Himself. If the p. 398 ↳ author of the bible had accommodated His text to his audience, that implied that God Himself is accommodating. Out of that "doctrine of divine accommodation" all manner of theories about the supernatural and the natural world were spun. From the original postulate that "[t]he Scriptures are adjusted to the capacity of mankind to receive and perceive them," it was a logical inference that "God adjusted his acts in history to the capacity of men to receive and perceive them." More specifically, "The law was given to all in a language to be understood by all."[17]

At once a theory of God, of human nature, and of law, the doctrine of divine accommodation, postulating that God accommodated His law to the capacity (and the limits of the capacity) of human beings to understand it, became the foundation of a broad tradition of thought out of which modern secularist scientific and political thought evolved. Funkenstein concentrates on how this theoretical tradition was applied to explain conundrums of the natural world, bringing forth the "Scientific Revolution."[18] But he also relates how the principle of divine accommodation was applied to another conundrum that troubled religious and political leaders alike: how were human beings supposed to deal with false beliefs?[19] More to the point, how were they supposed to deal with human beings who hold false beliefs? This was a political conundrum (what should political and religious leaders, as well as ordinary people, do with, or more menacingly, to, people with false beliefs?) and a scientific conundrum (what was it about human nature that made people hold false beliefs?), which led to much theorizing about the culturally bound nature of human cognition and the evolutionary nature of human cultures. But at bottom was a religious conundrum: Why did God *make* people who hold false beliefs? After all, given the fundamental theological postulate of God's omnipotence, He could have created perfect human beings, uniformly possessed of perfect knowledge of His law. The doctrine of divine accommodation did not provide an answer to this conundrum. But it did supply another postulate, namely, that God must have *chosen* to make human beings with faulty cognitive equipment and differing beliefs.[20]

The political theories generated by this line of reflection were by no means uniformly "liberal" in nature if by that we mean abjuring political repression and demanding that governments respect freedom of belief and rights to due process. Eminently flexible, the principle of divine accommodation was used to justify the most intolerant and repressive regimes as well as tolerant and liberal ones. Nonetheless, the argument that it constitutes a liberal political tradition not only *can* be made. I contend it is *only* when we recognize that it grew out of the theological tradition of divine accommodation that we can clearly see liberalism for what it is: a statist theory that justifies the state's exercise of emergency powers in the name of sacred principles of law. This is not to deny that liberalism also is a theory about how to deal with the frailty of human cognitive powers and the need to rein in the exercise of political power. But it is to insist upon the inseparability of conservative doctrines of law and order from the liberal doctrines of freedom and due process that grow out of the recognition of human cognitive frailty.

p. 399 What holds these contradictory elements together is a particular logic that was produced by an ongoing argument about how God's law could be followed given the existence of disagreement, and by a consequent lack of certainty, about what the content of God's law is. Beginning from the premise that divine law (and God) exists, the argument invoked the doctrine of divine accommodation and worked its way through a series of logical steps to the conclusion that, in the here and now of the temporal world, divine law has to be suspended and replaced by law created by human beings. The doctrine of divine accommodation thus generated a theological argument for the necessity of secular law.[21]

So conceived, secular law has a complex and paradoxical relationship to the divine law from which it derived. On the one hand, it was understood to be precisely not divine but, rather, an anthropological "manmade" artifact. Authored by human beings, the product of human societies and cultures that differ over time and place, secular law was understood to deviate from and in fact violate the requirements of sacred law (as when judges execute punishments based on wrongful convictions.)[22]

On the other hand, secular law was thought to reflect the divine will in two different ways. First, saying that human understanding of God's law is imperfect is not the same as saying it is nonexistent. Moreover, it was posited by the doctrine that human beings and societies were implanted with a mysterious capacity to increase their understanding of God's law over time. The core idea that emerged out of the original explications of the bible's "embarrassments" was that God preferred for human understanding (and cultures) gradually to evolve.[23] This idea of growing convergence between divine and secular law was one way human law could be said to reflect divine law even as it deviated from it.

That stood in tension with the second, more subversive way in which the doctrine imagined human law's connection to divine will. According to this view, divine law truly is hidden, rendering human beings the exclusive agents of their history and the exclusive source of authority in the "sublunar" world.[24] In effect, the doctrine authorized (and held that God authorized) the suspension of divine law and its replacement by the manmade law of mere mortals. So conceived, secular law had an increasingly tenuous connection to divine law, even as it was viewed as divinely ordained.[25]

p. 400 This picture of law was the product of sustained thinking about two political puzzles. The first was the aforementioned question of how to behave toward people with different beliefs.[26] In particular, differing beliefs about how people ought to *behave* posed a pressing political problem because such beliefs impel people to act in ways that people with other moral beliefs perceive to be immoral, blasphemous, and dangerous. It was therefore a matter of great urgency whether people should to try to convert people to their own beliefs, or get rid of people with different beliefs about how to behave, or tolerate them. The principle of divine accommodation did not directly answer this pressing policy question. But it did supply an important basis for figuring out how to answer it by addressing a more basic question, namely, *why* did people have different beliefs and values? Building on the ideas developed in the context of applying the principle of accommodation to biblical exegesis, the answer arrived at was that the existence of different beliefs was part of God’s plan. God, according to this account, accommodated His law to people’s different beliefs as an accommodation to the faulty cognitive equipment which He Himself had implanted in human beings (for inscrutable reasons human beings simply had to accept). The startling conclusion of this line of analysis was that God allowed people to be ruled by their mistaken beliefs about law, rather than expecting them to be governed by divine law. Further, the doctrine held, God allowed different groups of people to be ruled by different beliefs about the rules that should guide human behavior.

In addition to being a theory of legal pluralism, this was an essentially anti-theocratic theory of law, holding, in essence, that theocracy is impossible because no human being has access to divine law. “Religion” from this standpoint refers not to divine truth but rather and precisely to the inherently faulty beliefs that different groups of people or “nations” hold, in particular, beliefs about the content and source of law. As, more often than not, a deity was viewed as the author of the law, the terms “religion” and “law” were essentially synonymous. The principle of “religious accommodation” in this context was simply an expression of the recognition that different groups held different beliefs about the source and content of law—and did so with God’s approval. It was not nations that were believed to be commanded to accommodate different beliefs in the first instance. It was God who was believed to accommodate different religious (i.e., legal) beliefs by separating them out into different legal systems or “nations.”[27]

The second political issue to which the doctrine was applied was the problem of law enforcement.[28] The issue again was one of mistaken or faulty beliefs. But here it was not a matter of the beliefs about the content of the law that separated people into different “nations” but, rather, the beliefs arrived at by the p. 401 people within a particular nation who ↳ were entrusted with applying and enforcing the law (i.e., legal authorities). The problem, in short, was wrongful conviction, erroneous legal judgments resulting from the same faulty cognitive equipment that produced the imperfect beliefs about the law that differentiated people into separate nations. In response to the problem of enforcing the law, the doctrine of divine accommodation was invoked to justify the institution of imperfect but effective legal institutions capable of protecting people from the perceived danger.

The justification given for allowing convictions to be rendered on the basis of mistaken beliefs essentially replicated the argument for accepting the existence of different religious belief systems (i.e., legal systems), but with one crucial embellishment: the distinction drawn between substantive and procedural law.[29] Divine law, canon lawyers and rabbis observed, is made up of both substantive and procedural rules.[30] And while the substantive commandments and the punishments for breaking those commandments were notoriously strict (an eye for an eye, etc.), so too were the rules of evidence and other procedural safeguards that biblical law said had to be followed before a judge could draw a conclusion about whether the substantive law has been violated. That cut against the strictness of biblical law. Indeed, adhering to the sacred law of *procedure* was observed to make it virtually impossible for human legal actors to secure convictions for violations of the bible’s substantive law.

More than that, it was widely understood that the biblical procedural standards were *intended* to be impossible to satisfy. As proponents of the accommodationist theory of law enforcement saw it, the procedural law of the bible prevented the powers entrusted with the implementation of the substantive law from inadvertently violating it by ensuring that trials never resulted in convictions. This reflected the understanding that any rules of procedure which would permit human beings to reach guilty verdicts would inevitably lead to erroneous judgments that violated the substantive sacred law.

This belief, that God had made divine law inherently unenforceable, generated a profound puzzle for devout thinkers. Why would God permit crimes to be committed with impunity, leaving people to suffer at the hands of others without any protection or redress? More fundamentally, *would* God have done so? This question went beyond the epistemological questions around which the doctrine of divine accommodation revolved to reach the fundamental issue of theodicy: Would a good God let bad things to happen to good people? More specifically, would God really want people to refrain from establishing effective means of law enforcement to rein in the human impulse toward aggression?

Some, theological quietists, said yes. This theological point of view addressed the problem of theodicy by denying that a world without effective legal and political institutions is a world in which crime is committed with impunity. According to the quietists, this was a false premise because the law would be enforced and everyone would meet their just deserts—in the afterlife.

p. 402 Quietist theology reflects the view that human judgment is so hopelessly fallible that it is worse for human beings to try alleged wrongdoers than to do nothing at all.[31] Accommodationist theology also rested on a deep skepticism about claims to infallible knowledge. But it tempered its skepticism with a more pragmatic view of human reason as adequate to the tasks of decision-making in the world. Against the quietist position that it was God's will for people to suffer patiently and wait for justice to be done in the afterlife, accommodationist political theology held that a benevolent God could not possibly have intended for human beings to live in the world of chaos and violence that results from the absence of effective law enforcement institutions on earth. It rejected the ideal of Christ-like martyrdom that religious quietists embraced as an untenable demand to impose on ordinary human beings, which could not possibly be the will of God.

More fundamentally, accommodationist theology disputed the temporal standpoint from which the quietists measured the duration of the state of emergency that exists when effective institutions of law enforcement are absent. The quietists adopted the standpoint of eternity. The doctrine of divine accommodation was, at bottom, a rejection of the standpoint of eternity. Its most fundamental tenet was that God accommodates the standpoint of human beings embedded in the material, temporal world. From that standpoint, the duration of secular time *is* an eternity. The conclusion that followed from this was that the state of emergency created by humans' inability to know and enforce the divine law is "permanent"—not, to be sure, permanent from the standpoint of eternity, from which all of mortal life is by definition temporary, but permanent from the standpoint of secular time, the human standpoint, which, the doctrine of divine accommodation maintains, is the relevant standpoint from which to judge the duration of injustice and human suffering.

The institution of secular law was thus justified as a necessary (and divinely sanctioned) response to a "permanent" state of emergency. In order for human beings to be able to enforce the law in the here and now, accommodationist political theology recognized, it is necessary for them to construct legal systems with less stringent standards of evidence and procedural safeguards than those prescribed in the bible. Secular law, according to this account, is a species of emergency law. It is indeed the ur-emergency law; the ur (legal) text human beings author and execute via the establishment of effective albeit imperfect institutions of law enforcement; the law ushered in by virtue of the divine law authorizing its own suspension as an accommodation to human beings' cognitive limitations combined with their need for physical protection. Secular law, so construed, is thus humanly authored and divinely sanctioned, imperfect but adequate for life in the material world.

21.3 The Problem of Liberalism

This account of political theology readily explains how Christianity (and Judaism) became “terrestrialized.” But the riddle of how Christianity and Judaism “birthed” liberalism remains to be explained. There are two p. 403 serious challenges to the claim that it did. First, ↳ the political theory derived from the postulates of the theology of divine accommodation is undeniably a conservative political theory, a theory according to which a strong state, exercising emergency powers, is necessary to protect one group of people, those who deserve the state’s protection, from other people, who constitute threats. This is a tradition of political theory that exhibits all of the hallmarks of Schmittian political theology: the friend/enemy binary, the emergency theory of politics, the belief that the state of emergency is permanent, the justification for the suspension of due process. It is, in short, a statist theory, falling into the long tradition of “dirty hands” theory of politics.[32]

Another challenge to the liberal nature of accommodationist political theology concerns its treatment of the question of religious accommodation. Accommodationist political theology did not require governments to accommodate different religious beliefs any more than it required governments to observe strict rules of judicial procedure. To say that God accommodates religious differences does not logically imply that God requires human beings or governments to do so. And while the belief that governments are commanded to tolerate different beliefs is logically consistent with the principle of divine accommodation, so too is the idea that human beings have been separated into different nations, each with their own law, within which the accommodation of religious differences is not required (indeed, might be prohibited). The principle of divine accommodation was sufficiently malleable that it could be used to justify religiously intolerant and oppressive regimes as well as liberal policies of religious tolerance and accommodation. Even the inquisitorial state, charged with task of converting other nations, was justified in terms of the theology of divine accommodation as the agent of the divine evolutionary plan to move errant believers toward correct belief.[33]

But, as imagined and justified in the accommodationist tradition, the Christian inquisitorial state was not, strictly speaking, a theocracy. Theocracy depends upon the belief in the existence of an infallible human authority. By contrast, the theology of the Holy Roman Empire reflected the accommodationist belief in the unavailability of infallible human authorities and the consequent necessity of political dirty hands. That belief went hand in hand with the belief that secular, political authority and spiritual, religious authority belong to two separate spheres.[34] Of course, in practice, the line between the political theology of theocracy and this two kingdoms political theology, which was precisely anti-theocratic (i.e., secularist), often blurred. It is hard to justify a kingdom as divinely ordained without slipping into, and promoting, the belief that the leaders whose authority to rule is being justified are infallible. In theory, however, two kingdoms political theology was opposed to that belief. Its conception of separate religious and political spheres did p. 404 not mean that religious authorities could not participate in secular ↳ government. Nor did it mean that political rulers could not involve themselves in the governance of the Church and claim the mantle of divine authority. But it did bespeak the recognition that what the mantle of divine authority cloaked was hardly divine law,[35] and, further, that when religious authorities participate in political governance and law enforcement, they themselves enter into the sphere of secular power and dirty hands.

This early incarnation of the principle of separation between church and state was simply the logical implication of the core accommodationist tenet that divine law is unavailable in the temporal world and must be substituted by human systems of law. It did not necessarily imply that the state should accommodate different beliefs, only that it should respect the autonomy of the Church. But it was a recognizably liberal as well as secularist principle that stood at the foundation of the accommodationist political tradition.

But what makes this tradition truly the font of liberalism is the dialectical theory of history in which this original principle of separation between religious and secular law is embedded. The idea that human history unfolds dialectically was the logical outgrowth of the simultaneous insistence that human legal institutions are all fallible and that they are nevertheless necessary in order to meet basic human needs—and therefore justified. There is no denying the tension between the propositions that our legal institutions are justified and that they are flawed, indeed, unjust. The only conceivable escape routes out of this contradiction were those posited, respectively, by the political theologies of theocracy and quietism: either deny the unavailability of an infallible human authority or submit to the unjust exercise of power. But both of these escape routes are precluded by the accommodationist theory of human needs, which rejects the existence of infallible human authorities *and* the principle of submission to unjust human authority. What follows from the rejection of these two alternative political theologies is the need to accept the coexistence of contradictory principles as an inherent feature of the human condition. That acceptance, however, was coupled with a belief (first formulated in terms of a belief in divine "cunning")[36] in the existence of an irrepressible human impulse to resolve the contradictions that undermine justice by searching for ever "more perfect" syntheses of our contradictory human needs. Insisting on the impossibility of a perfect conclusive resolution, accommodationist theology conceives of history as a series of necessarily imperfect, but progressively more perfect, attempts to resolve the contradictions inherent in every established political system. Each contradiction gives way to the next as they inevitably rise to the surface, giving rise to their subsequent critique and eventual replacement with a new set of political arrangements. As the tension between the theory's justification for suspending strict rules of due process and its awareness of human cognitive error mounts, more liberal doctrines of due process are demanded. As the contradiction between the picture of an accommodating God and human practices of religious intolerance becomes too great to bear, more liberal policies of religious accommodation are adopted and implemented, within the state as well as within religious communities.

p. 405 Locating accommodationist thought in the terrain of dialectical humanism explains how what begins as a theological doctrine evolves into a thoroughly secularist doctrine, according to which human beings prescribe and enforce the rules of morality. It likewise explains how the emergency theory of the state evolves in a liberal humanist direction. Of course, it is always debatable whether any particular reform is moving in a humanist, liberal or post-liberal, direction. If the doctrine of divine accommodation tells us anything it is that no one can say for sure what is a fulfillment, as opposed to a betrayal, of humanist ideals. What we can say is that this awareness is itself a liberal precept that threads throughout the accommodationist tradition. It is out of this awareness of human cognitive deficiencies that the entire tradition of accommodationist thought unspools. That provides a basis for concluding not only that this tradition of Christian and Jewish theology "birthed liberalism" but also that liberalism, so conceived, is inseparable from the doctrines of statism, emergency law, and dirty hands associated with conservative political theory. From this perspective, there is no dichotomy between the liberal state and the emergency state. The liberal state is an emergency state, which is simply to say, a *state*, with force at its command.

The flip side of this conclusion is that the emergency state is a liberal state, which is to say, a state that accommodates human needs, first by providing for law and order, and then by developing procedural mechanisms for limiting and correcting erroneous judgments and adopting substantive policies of accommodating differences of belief. Liberalism, according to this view, is not incompatible with the older theological understanding of the state. It is a direct product of that theological understanding, which posits the necessity of its own secularization and dialectical unfolding as an always flawed incarnation of humanist ideals.

21.4 Humanism and the Lost Language of Law

What do we gain by recovering this lost logic of dialectical humanism and accommodationist political theology from which contemporary liberalism derives but has grown estranged? For one thing, it demonstrates the common root and ongoing linkages between law and the humanities. As scholars like Amos Funkenstein have shown, the natural and the human sciences and the theory and the practice of the secular liberal law are fruits of the same tree: the philosophy of humanism, which derived from the theology of divine accommodation.

Understanding the conceptual framework in which the concepts of religion, accommodation, and secularism were first developed also helps to resolve some of the knottier problems of contemporary legal doctrine. Once we recapture what the term “religion” refers to in this conceptual framework, many doctrinal difficulties that have long plagued this area of law melt away. For example, the question of how (or whether) to distinguish “nonreligious” from “religious” beliefs is readily resolved once we recognize that p. 406 ↳ religion is defined with respect to the principle of accommodation as the beliefs about the source and content of the rules of conduct that govern human behavior that different groups of people hold. Because this definition is not contingent on a continued belief that the source of those rules is divine, it follows that all moral convictions are properly classified as religious convictions. By the same token, accommodationist political thought (a.k.a. dialectical or secular humanism) understands itself to be a religion. Like other religions, secular humanism constitutes a humanly authored system of beliefs about the source of legal authority and the principles that should determine the content of the law.

This might seem to bolster the conservative case for adopting an expansive conception of religious accommodation (and rejecting the “religion” of secular humanism). But in fact these definitions of religion and secularism are tied to a conception of religious accommodation which undermines that cause. The argument for religious accommodation, which evolved out of the doctrine of divine accommodation, depends upon the same set of propositions that justify the institution of the state whose task is to impose law and order by enforcing a particular vision of law. The twinned beliefs, that human judgment is fallible, yet societies must be ruled by fallible judgments about the content and application of the law, demand a state capable of enforcing the law as well as accommodating different beliefs. From this point of view, accommodation is an obligation that must be overridden, not only when the state’s countervailing interests are compelling but whenever granting an accommodation undermines its ability to enforce its law.

The principle of religious accommodation was originally a religious doctrine about the need for religious people to accommodate different religions. It reflected the understanding that it was neither possible nor desirable to live a life of spiritual purity, uncontaminated by contact with people with different beliefs. Over time, the doctrine became secularized. But it always was tethered to the belief in the necessity of a secular state that exercises power for the sake of maintaining order. Granting religious accommodations is an act of power. And receiving a religious accommodation, no less than granting one, necessarily entails dirty hands. To hold otherwise, and to insist upon the right not to be associated in any way with “immoral” beliefs, is to reject the logic of accommodation.

One can, of course, reject this logic. Modern-day heirs of quietist and theocratic political theologies do just that. From their point of view, there is no reason not to prise apart the principle of religious accommodation from the principles of statism and secularism in which it was historically embedded, since their common aim is to undermine the authority of the secular state and the “false” religion of secular humanism that undergirds it. But defenders of the secular state cannot afford to lose sight of the logic of accommodation which binds the secular state, the emergency state, and the liberal state together. The old way of understanding how these fit together may no longer be available. But without a new way of conceiving of their relationship, which acknowledges their interdependence, no version of religious accommodation will survive; nor will the secular state.

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Notes

1 Employment Division v. Smith, 494 U.S. 872 (1990).
2 Smith, 494 U.S. at 879 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879)).
3 Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb et seq.

4 See, e.g., 42 U.S.C. §§ 2000bb-1(b), 2000cc(a).

5 See Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2786 (2014).

6 See, e.g., Marcel Gauchet, *The Disenchantment of the World: A Political History of Religion*, trans. Oscar Burge (Princeton, NJ: Princeton University Press, 1997); Jeremy Waldron, *God, Locke and Equality: Christian Foundations in Locke's Political Thought* (Cambridge: Cambridge University Press, 2002); Larry Siedentop, *Inventing the Individual: The Origins of Western Liberalism* (Cambridge, MA: Harvard University Press, 2014).

7 See, e.g., Giorgi Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998); *Sovereignty, Emergency, Legality*, ed. Austin Sarat (Cambridge: Cambridge University Press, 2010); Paul Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (New York: Columbia University Press, 2011).

8 For parallel traditions in Jewish political thought, see Suzanne L. Stone, "Religion and State: Models of Separation from Within Jewish Law," *International Journal of Constitutional Law* 6 (2008): 631–661; Menachem Lorberbaum, *Politics and the Limits of Law* (Stanford, CA: Stanford University Press, 2001).

9 I base my account primarily on Amos Funkenstein, *Theology and the Scientific Imagination from the Middle Ages to the Seventeenth Century* (Princeton, NJ: Princeton University Press, 1989). I also rely on Kathy Eden, *Hermeneutics and the Rhetorical Tradition: Chapters in the Ancient Legacy and Its Humanist Reception* (New Haven, CT: Yale University Press, 1997).

10 Samuel Moyn, "Did Christianity Invent Liberalism?" (2015), https://bostonreview.net/books-ideas/samuel-moyn-larry-siedentop-christianity-liberalism-history.

11 It is impossible to create a comprehensive catalogue of philosophers who expounded this tradition. Arguably, the entire tradition of Western political philosophy, including canonical liberal thinkers such as Locke, should be reconceptualized as an expression of accommodationist thought. Recognized exponents include, inter alia, Melanchthon, Erasmus, Eusebius, Augustine, Maimonides, Ibn Ezra, Aquinas, Vico, Bodin, Ockham, La Preyere, Hobbes, and Spinoza.

12 Eden, *Hermeneutics and Rhetorical Tradition*, 2–14, 102; Funkenstein, *Theology and Scientific Imagination*, 213–215.

13 Funkenstein, *Theology and Scientific Imagination*, 205–213.

14 Ibid., 202–289.

15 Ibid., 214.

16 See, e.g., Daniel Stolzenberg, "John Spenser and the Perils of Sacred Philology," *Past & Present* 214 (2012): 129–163, 149.

17 Funkenstein, *Theology and Scientific Imagination*, 213–214, 222.

18 Ibid., 18–201.

19 Ibid., 213–271.

20 Ibid., 222–227.

21 Ibid., 3–9, 346–363; Lorberbaum, *Politics and Limits of Law*.

22 See Richard M. Fraher, "The Theoretical Justification for the New Criminal Law of the High Middle Ages: 'Rei Publicae Interest, Ne Crimina Remaneant Impunita,'" *University of Illinois Law Review* (1984): 577–595; Gil Graff, *Separation of Church and State: Dina De-Malkhuta Dina in Jewish Law, 1750–1848* (Tuscaloosa: University of Alabama Press, 1985); J. David Bleich, "Jewish Law and the State's Authority to Punish Crime," *Cardozo Law Review* 12 (1991): 829–857; Suzanne L. Stone, "Sinaitic and Noahide Law: Legal Pluralism in Jewish Law," *Cardozo Law Review* 12 (1991): 1157–1214; Oren Gross, "Violating Divine Law: Emergency Measures in Jewish Law," in *Extra-Legal Power and Legitimacy: Perspectives on Prerogative*, ed. Clement Fatovic and Benjamin A. Kleinerman (New York: Oxford University Press, 2013) 52–74.

23 Funkenstein, *Theology and Scientific Imagination*, 211, 222–227.

24 Ibid., 204 (identifying the "strong sense of the absolute autonomy and spontaneity of human history" that developed).

25 As Funkenstein sums up, "It seems as though the secular theology of the seventeenth century was bound to dig its own grave, because it often stressed, however ambiguously, the self-sufficiency of the world and the autonomy of mankind." Ibid., 346.

26 Ibid., 254, 265.

27 Vico is the exemplar of this line of thinking, which Funkenstein links to the idea of the invisible hand. ("From Vico to Marx, they [the theorists of the invisible hand] envision the subject of history—human society—as capable of generating all of its institutions, beliefs, and achievements of itself.") Ibid., 204.

28 For a fuller explication, see Nomi Stolzenberg, "The Profanity of Law," in *Law and the Sacred*, ed. Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey (Stanford, CA: Stanford University Press, 2007) 29–90.

29 See Stolzenberg, "Profanity of Law."

30 See sources cited in note 22.

31 See Fraher, "Theoretical Justification for New Criminal Law"; Stolzenberg, "Profanity of Law," 43–44.

32 See Michael Walzer, "Political Action: The Problem of Dirty Hands," *Philosophy & Public Affairs* 2 (1973): 160–180. See also Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, 2d ed., trans. George Schwab (Cambridge,

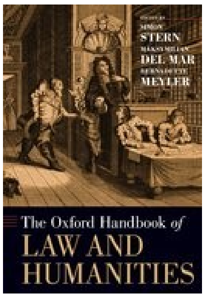
MA: MIT Press, 1985) [1932]; Carl Schmitt, *The Concept of the Political, Expanded Edition*, trans. George Schwab (Chicago, IL: University of Chicago Press, 2007) [1932].

33 See, e.g., the discussion of Eusebius's justification of the Roman Empire as "predestined to evolve into the kingdom God." Funkenstein, *Theology and Scientific Imagination*, 256–258.

34 See ibid., 256–271.

35 Ibid., 259.

36 Ibid., 235. See also Stephen Benin, "The Cunning of God and Divine Accommodation," *Journal of the History of Ideas* 45 (1984): 179–191, 187.



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CHAPTER

22 Machiavelli's Camillus and the Tension Between Leadership and Democracy

John P. McCormick

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Abstract

This chapter challenges cynical understandings of Machiavelli's conception of leadership, demonstrating the extent to which it fully comports with and uniquely enables both democratic politics and what he calls the "free way of life." Through Machiavelli's example of the ancient Roman statesman, Furius Camillus from the *Discourses*, this chapter delineates the salutary interactions between leaders and citizens that Machiavelli considered indispensable for the realization of liberty within democratic regimes. It demonstrates how the influence exerted and the prerogative enjoyed at key historical junctures by a political leader like Camillus does not constitute usurpations of popular deliberation but rather serve, in conjunction with popularly empowering institutions, as necessary complements to democratic judgment. Indeed, Machiavelli suggests that the most intimate bonds between leaders and citizens often form after the latter have angrily dismissed the former from office, or even exiled them from the polity, only subsequently to reappoint them or invite them back. Drawing upon classical humanistic sources—in particular, Livy and Plutarch—Machiavelli intimates that Camillus, Rome's frequently appointed supreme magistrate, gained unprecedented trust and authority from the Roman people by accepting their decision to exile him, by faithfully returning to the city during a dire crisis when they summoned him back, and, on numerous subsequent occasions, by eagerly relinquishing command once he'd fulfilled his designated assignments.

Keywords: Machiavelli, democracy, leadership, Roman Republic, Camillus

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NOTORIOUS as the author of *The Prince*, Niccolò Machiavelli (1469–1527) is conventionally considered a cynical adviser of ruthless tyrants; an immoral or, at best, amoral strategist who counseled leaders to aggrandize themselves—by any means necessary—at the expense of their subjects and citizens. This chapter challenges this common understanding, demonstrating the extent to which Machiavelli's conception of leadership is fully compatible with and, indeed, uniquely enabling of both democratic politics and what he calls the "free way of life." Through Machiavelli's example of the ancient Roman statesman, Furius Camillus from the *Discourses*, I delineate the salutary interactions between leaders and citizens that Machiavelli considered indispensable for the realization of liberty within democratic regimes.[1]

Since the sixteenth century, cynical views of Machiavelli's supposedly nefarious prescriptions for political leadership were propagated by no lesser luminaries than Gentillet, Marlowe, Shakespeare, Frederick the Great, and Diderot; and in the twentieth century it was given formidable re-expression by the still immensely influential works of Leo Strauss and his many devotees.[2] A more recent set of scholars, loosely p. 410 affiliated with "the Cambridge School" of intellectual history—most impressively, Quentin Skinner ↳ and John Pocock—have contested the "tyrannical" interpretation of Machiavelli, choosing instead to emphasize the place of liberty, the common good, and republicanism in the Florentine's political thought.[3] However, such scholars overcompensate in their efforts by virtually ignoring the central role played by leadership in Machiavelli's political writings. Refuting the interpretative efforts of each of these dominant schools of Machiavelli interpretation, this chapter demonstrates how Machiavelli guides both politically entrepreneurial individuals and politically empowered citizenries to secure and enjoy the fruits of civic liberty exclusively afforded by popular governments.

Unlike most authors in the history of Western political thought, Machiavelli refuses to grant leaders of republics an exclusively active political role and confine citizens to a narrowly passive one. Machiavelli attributes, for instance, the freedom and greatness of both the Roman Republic and Athenian democracy to the power that each polity afforded common citizens to appoint officials, initiate and decide laws, judge individuals accused of political crimes, and, furthermore, speak out formally and publicly on such matters in assemblies.[4] Additionally, contra widespread misperceptions that Machiavelli reduces leadership to the unilateral exercise of force and fraud, the Florentine consistently accentuates crucial moments when political leaders, rather than manipulating or even simply persuading the people, are themselves wisely convinced or directed by salutary public opinion to change their course of action in ways conducive to the common good (e.g., D I.53). Put bluntly, Machiavelli's conception of leadership is not fundamentally incompatible with democracy. Using Machiavelli's decisive Roman example of Furius Camillus—and his inferior Florentine example of Piero Soderini—I demonstrate how the influence exerted and the prerogative enjoyed at key historical junctures by political leaders do not constitute usurpations of popular deliberation but rather serve, in conjunction with popularly empowering institutions, as necessary complements to democratic judgment.

Indeed, Machiavelli suggests that the most intimate bonds between leaders and citizens often form after the latter have angrily dismissed the former from office, or even exiled them from the polity, only subsequently to reappoint them or invite them back. For instance, Machiavelli intimates that Camillus, Rome's frequently appointed supreme magistrate, gained unprecedented trust and authority from the Roman people by accepting their decision to exile him, by faithfully returning to the city during a dire crisis when they summoned him back, and, on numerous subsequent occasions, by eagerly relinquishing command once he'd fulfilled his designated assignments (D I.29, III.1, III.30). Certainly, Machiavelli demonstrates, Camillus earned much more trust and authority than Florence's Gonfalonier of Justice, Soderini, gained from the p. 411 Florentine people by obsequiously imploring the latter to allow him, independent of all circumstances, to ↳ hold the republic's highest office in perpetuity (D III.30). Soderini, Machiavelli insinuates, refused to entertain the long-term advantages that his own resignation, deposition or exile might pose for himself and his republic, until such time as his—by then unavoidable—expulsion coincided with his republic's collapse, thus insuring that no Florentine republic would exist at all to call him back and reappoint him.

Machiavelli draws upon classical humanistic sources, in particular, Livy and Plutarch, to demonstrate how the Roman people came to trust Camillus like no leader before or after him. Indeed, he held the dictatorship, Rome's simultaneously ordinary-extraordinary magistracy praised by Machiavelli, an unprecedented and unsurpassed number of times.[5] Camillus frequently abandons supreme command after accomplishing his appointed tasks, bears no discernible grudge to the Romans for exiling him, and exhibits exemplary military skill in defending the republic from fearsome enemy threats. Machiavelli shows how Camillus initially incurs popular hatred and mistrust by combining, on the one hand, military severity and solicitude with, on the other, ostentatious self-aggrandizement. However, prudence and patriotism eventually enable Camillus to learn how to win popular adoration by displaying his severity and solicitude in tandem with humanity and magnanimity. While the young Camillus carelessly parades the extent of his vast personal ambition, he eventually learns to observe civic decorum and forswear extraordinary authority, such that, in Machiavelli's estimation, it becomes impossible to determine definitively whether the dictator serves as the ultimate champion of civic liberty, whether he reigns as Rome's intermittent king, or both. In any case, Camillus's painfully learned and prudently executed deference to popular judgment makes both Rome's renowned civic liberty and his own unprecedented authority possible.

22.1 Prudence, Return to Beginnings, and Reform of Corrupt Republics

Machiavelli sets the stage for his comprehensive reflections on one of Rome's most illustrious magistrates, Furius Camillus, in the opening chapter of the *Discourses*' third and final book. This lengthy chapter also happens to constitute Machiavelli's elaborate, if nevertheless still perplexing, ruminations over the reform of corrupt republics. Let us examine how Machiavelli's discussion of Camillus, "Rome's most prudent captain," initially emerges out of his extensive discussion of republican corruption and renewal. Machiavelli subsequently uses Camillus to cast in relief the poor leadership exhibited by modern civic magistrates, exemplified by his former employer and patron, Piero Soderini, the ill-fated "Gonfalonier for Life" of the even worse-fated Florentine Republic.

Machiavelli titles Book III, chapter 1, "The Longevity of Sects and Republics Requires Frequent Returns to Their Beginnings." In this chapter, Machiavelli reflects upon phenomena that facilitate either the corruption and demise or the renewal and perpetuation of republics. If complex, composite social bodies, such as religions and polities, are to change in salutary rather than deleterious ways, Machiavelli avers, they must be continually and frequently directed back toward their origins. Beneficial changes, reforms that foster "renewal," he insists, are those that lead such mixed bodies "back to their beginnings." Machiavelli identifies two factors that "intercede" to redirect republics, in particular, toward their origins and, hence, factors that may engender republican renewal: "Republics are returned to the beginnings by either extrinsic accident or intrinsic prudence" (D III.1).

Machiavelli identifies the invasion of the Gauls in 390 BCE as an external accident that returned the Roman Republic to its beginning. This invasion, and the Romans' ultimate response to it, exemplified by Camillus's civic and military heroism, gave the republic "new birth, life and virtue" by revitalizing "religion and justice" (D III.1). Before the Gauls invaded, Machiavelli argues, the Romans were diverting from both religious practices and "other good institutions" that Romulus, and other early kings, "had prudently ordered for the free way of life." However, Rome's "external beating" by the Gauls, according to Machiavelli, was directly attributable not only to the aforementioned corruption of its civic, religious, and military orders but also to another form of corruption: the republic's diminishing respect for "good and virtuous citizens" (D III.1).

In this regard, the French invasion served as an external accident that once again prompted the Romans to "esteem good citizens for their virtue rather than blame them for their defects" (D III.1). In particular, Machiavelli declares, after the invasion, the senate and the people "set aside their envy of the good and virtuous" Roman commander, permitting him once again "to bear the full weight of the republic."

Therefore, the invasion may have been an “external accident,” but it also inspired exhibitions of the kind of “internal prudence” also invoked by Machiavelli as an impetus for renewing a republic: certainly, the prudence of Camillus, who saved the republic by returning from exile to expel the invasion, but it also entails the renewed prudence of the senate and the people, who called Camillus back to do so—and who henceforth placed the republic’s well-being upon his shoulders for as long as he lived.

In this chapter, Machiavelli somewhat imprecisely distinguishes the external and internal factors that prompt republican renewal. As noted above, it is not clear whether the external accident of the Gaul’s invasion or Camillus’s prudence in repelling it constitutes the true cause of Rome’s salutary return to beginnings. After all, without Camillus’s prudence and virtue (and the Romans’ renewed prudence in recalling him) the city may have been entirely destroyed by the Gauls. Moreover, Machiavelli subdivides his classification of the internal factors that generate republican renewal into, on the one hand, “intrinsic orders” or “laws,” and, on the other, the personal “prudence” and “virtue” of an individual man, that engender such renewal. More specifically, Machiavelli identifies such intrinsic factors as either “a law that often assesses and renders accountable the men who constitute that body” or “the example of a good man p. 413 who emerges among them, ↳ whose virtuous deeds produce the same result as the order” (D III.1). In terms of laws that enable republics to properly appraise men and, when warranted, hold them accountable, Machiavelli shows elsewhere that, not long after the French invasion, Manlius Capitolinus is tried and executed for kingly ambition (D III.8), and that Camillus is made dictator an unprecedented number of times, often exercising absolute authority over the city’s institutions, including the senate and the popular assemblies (D III.30). Moreover, after Camillus’s second founding of the city, in which the dictator reaffirmed Rome’s commitment to religious and military discipline, the republic would never again suffer foreign invasion—in fact, it would proceed to make itself head and defender of the entire Italian peninsula.

Given Machiavelli’s imprecision here, we must further interrogate his claims regarding returns to beginnings that renew republics. Again, Machiavelli remarks that “men living in common” frequently require internally generated reforms such as, on the one hand, those manifested in laws that surveille and correct citizens “by holding them to account,” or, on the other, reforms initiated by the emergence of “an exemplary and virtuous man,” whose actions produce the same salutary results as do laws that facilitate suspicious evaluation and severe correction of wayward citizens (D III.1). This raises a conundrum: Camillus’s exile resulted directly from legally aired public accusations and popularly judged political trials that, as we observed above, Machiavelli enthusiastically recommends republics to employ so as to hold ambitious citizens accountable (D I.7–8); and yet Camillus is precisely the kind of good and prudent man whose exemplary virtue sets civically salutary examples for other citizens to follow. It would seem that a deep contradiction, or at least a stark tension, potentially plagues Machiavelli’s account of the legal as opposed to personal means available for republics to redeem themselves by returning to their beginnings. Perhaps the Camillus who returned to save Rome was substantially transformed by the public trial that resulted in his exile from the republic. We cannot, however, fully address this question until we examine Camillus’s career in more detail in Section 22.3.

Machiavelli concludes this discussion of internally generated republican renewal by again affirming either “the virtue” of “a man” or “an order” that produces “good results in republics” (D III.1). What should not be overlooked is the fact that when the ancient Romans were confronted by a “French” invasion, a prudent and virtuous individual like Camillus was available to rescue and refound that republic; on the contrary, when the modern republic for which Machiavelli is writing, Florence, endured a French invasion in 1494, deficiently prudent and deeply unvirtuous individuals emerged to carry out, at best, partial reforms of the city: as mentioned above, Girolamo Savonarola, Francesco Valori, and, especially, Piero Soderini. All of these Florentine “almost” princes, according to Machiavelli, succumbed to the ambitious envy of rival citizens such that before long foreign enemies again invaded the city (the Spanish army in 1512) and the Medici returned from exile to overthrow the republic and re-establish a tyranny (D I.45, D I.7, D III.9).

In the case of ancient Rome, Machiavelli insists, the “accident” of a French invasion, despite threatening the city with near extinction, actually made possible “the revitalization of the city’s orders” (D III.1). Rome p. 414 came very close to being eradicated by Gauls, but for ↳ the virtue of Camillus (D I.8). Having averted total annihilation, the Romans, Machiavelli observes, again came to acknowledge the following: the necessities of “maintaining religion and justice, of esteeming good citizens, and of assessing the latter according to their virtue rather than any deficiencies that their deeds might otherwise exhibit” (D III.1). Machiavelli notes that after the expulsion of the French, the Romans eagerly renewed their ancient religious orders, properly punished those who had instigated the invasion, and appropriately put aside their envy in order to properly esteem Camillus’s exemplary virtue and goodness.

22.2 Eliminating Envy, Military Necessity, and Expeditious Resignation

Late in Book III of the *Discourses*, Machiavelli revisits his analysis of Soderini in reflections where Camillus, the frequently appointed Roman dictator, becomes Machiavelli’s ancient foil for his former patron, Soderini, the Florentine Gonfalonier “for Life.” In particular, *discorso* 30 seems to be a chapter devoted to two distinct themes: first, the manner in which the Romans abandoned the envy that they previously directed toward exemplary citizens, such as Camillus; and, second, a reaffirmation of the Roman Republic’s virtuous military ordering. Its lengthy title is comprised of two parts: “One Citizen Wishing to Benefit His Republic with His Authority Must Eliminate Envy; and How One Must Order a City’s Defense Against Enemies” (D III.30). However, the chapter in its entirety turns out to be a thoroughgoing indictment of the incessantly envious and woefully unarmed Florentines: the “enemies” mentioned in the title’s second clause prove to be not merely hostile external armies but also, and more pointedly, the kind of envious citizens within a republic invoked in the first clause—envious citizens whom Soderini, in particular, failed to manage or eliminate such that they in turn expelled him and overthrew the republic. Thus, although chapter 30 seems to be a combination of two distinct *discorsi* in one, the two parts prove to be intimately related: good citizens may more readily eliminate the envy of domestic rivals when they prove especially adept at defeating external enemies.

Machiavelli begins the chapter by recounting how the Roman Republic confronted a dangerously powerful alliance of Latin, Hernici and Volscian armies moving against them (D III.30). Camillus, one of the recently elected five consular tribunes, thought the appointment of a dictator to be unnecessary—perhaps because he presently held consular authority, and therefore would have been legally ineligible to serve as dictator, Camillus declared that if his consular colleagues would be willing to grant him supreme command, informally, in these dire circumstances, then there would be no need, formally, for resort to the dictatorship. Camillus’s colleagues readily granted him supreme authority over themselves and the city, Machiavelli claims, because they did not interpret any increase in his authority “to be a diminution of their own majesty.”

p. 415 Machiavelli previously recounted in great detail how, early in his career, Camillus had incurred the envy and suspicion of the Roman senate and people (D III.1). Yet, at this later point in his life and in the republic’s history, Camillus is granted absolute authority over the city, without formal recourse to the dictatorship, the ordinary magistracy that the Romans often relied upon to address extraordinary circumstances (D I.34). The full extent of both Camillus’s authority and the trust that his fellow Romans placed in him is exemplified by Machiavelli’s description of how Camillus prepared the city’s defense: most notably, “for the patria’s security,” he placed armed guards on both the senate house and the popular assembly. In other words, Camillus takes measures similar to those that, according to Machiavelli, notable Greek tyrants exploited in their efforts to usurp republics and establish principalities: figures such as Agathocles and Nabis in *The Prince*, and Cleomenes and Clearchus in the *Discourses*. Yet, for his part, Camillus does not on this occasion, despite the opportunity, employ force to seize formal princely authority for himself (D III.30). He leaves the republic's domestic institutions intact and he proceeds to defeat militarily its foreign enemies.

Machiavelli claims that Camillus was able to overcome envy in these circumstances because the dangerous "accident" of this unprecedentedly powerful military league threatening the republic made the Romans fear for their security (D III.30). As a result, they set aside their personal ambition and collectively pledged obedience to "a good and wise" man of "virtue" like Camillus. Again, Camillus does not technically abrogate constitutional norms by insisting, in an unprecedented manner, that the senate appoint him, a formally sitting magistrate, as dictator in these circumstances (D III.30); instead, in consultation with his consular colleagues, he assumes the role of an informal dictator, or a dictator without the official title. However, this outcome is only possible, Machiavelli insists, because of Camillus's previous exhibitions of virtue during his three earlier terms as dictator, terms in which he had always used his considerable authority "for the public and not for his personal utility." Camillus was, of course, historically renowned for holding the dictatorship an unprecedented number of times, and for renouncing such authority in each of his tenures as soon as he accomplished the tasks for which he was appointed. Hence, in present circumstances, Machiavelli writes, "no one either felt ashamed or feared his greatness" in granting him supreme authority (D III.30).

Besides the external accident of a foreign invasion, which obtained in this Roman episode, Machiavelli suggests that envy for a good and virtuous citizen may be eliminated "when those who are envious die either through violence or natural causes" (D III.30). In a corrupt city, "one lacking in good education," like Florence, however, "a dangerous accident such as an invasion will not prove sufficient to induce the envious to forsake their perverse spirits—even if it will result in the patria's ruin." The Florentine nobles did not forswear their envy for Soderini when the Spanish invaded in 1512; in actuality, their envy in no small part *caused* that invasion, which therefore was no "accident" in a conventional sense. To overcome such especially intense envy, Machiavelli declares, "the only remedy is the death of those who are consumed by it." He ruminates further: when the envious rivals of a good man, who wishes to employ his authority to benefit his city, die "ordinarily," then he "attains glory without controversy" (D III.30). It is not clear here whether an ordinary death corresponds with either violence or the natural causes—or both—mentioned above. After all, violent death that occurs through a capital execution conducted through proper judicial procedures and popular judgment constitutes an "ordinary" death, according to Machiavelli (D I.7–8). "Absent such luck," the virtuous man, who wishes to benefit his patria in confronting extraordinary accidents, "must consider every means of removing their obstruction and of holding firmly to whatever means will do so" (D III.30).

Such drastic recourse applies not directly to Camillus in these circumstances, but more appropriately to the additional examples of Moses and Soderini adduced by Machiavelli; neither Moses nor Soderini enjoyed circumstances where either natural causes or ordinary means conveniently eliminated the envy of their adversaries. Moses serves as Machiavelli's exemplary figure who successfully vanquished envy through extraordinary violence. As the Florentine declares: "Judicious readers of the Bible know that Moses, so as to ensure longevity for his laws and orders, was compelled to kill infinite numbers of men, motivated entirely by envy, who opposed him" (D III.30).

Soderini, Machiavelli insists, also understood the necessity of eliminating those who envied him, those who sought to undermine the reformed and refounded Florentine Republic, as Machiavelli's earlier reference to his prudence attests (D III.3). Unlike Moses, however, Soderini "believed that patience, goodness, kind fortune and gifts would eliminate such envy" (D III.30). He presumed that the relatively young age at which he was elected Gonfalonier for Life, and the widespread popular support he won by conducting himself as a defender of the Great Council within the new republic, would "enable him to conquer any number of envious adversaries without any controversy, violence or tumult" (D III.30). Yet, Machiavelli insists, the Gonfalonier was unaware that "one cannot outwait the envious, overcome their evil with good, rely on the consistency of fortune or appease the malicious with gifts” (D III.30). Thus Soderini, like Savonarola before him, “through either ignorance or incompetence, [was] ruined in the face of envy” (D III.30).

Machiavelli concludes the chapter by returning to the example of Camillus, emphasizing how meticulously the commander ordered the army that he left in charge of the city during the unprecedented military assault confronting Rome—in particular, how he set armed guards at the senate and popular assembly (D III.30). The Romans were certainly accustomed to preparations for war, Machiavelli notes; nevertheless, Camillus would not risk the possibility that the people might arm themselves “tumultuously” in these emergency circumstances such that chaos might ensue—or, perhaps, better conforming to the main theme of the chapter, he refused to risk the possibility that envious usurpers might exploit the tumultuous situation for their own nefariously ambitious ends. Machiavelli declares that those who are arming a people in the midst of a crisis must avoid doing so in a disorganized manner. Implicitly juxtaposing Camillus with Soderini, who did not, in fact, allow himself to become the commander of armed men in the city of Florence, Machiavelli writes:

> An individual charged with guarding a city ought to avoid like a shoal allowing men to arm p. 417 tumultuously. Rather, he must first enroll those whom he wishes to arm, ↳ appoint those whom they must obey, indicate where they should meet, and direct where they should go. Then, those he does not enroll should be commanded to remain in their own homes to guard them. He who maintains such order in a city that confronts an assault will readily defend himself; he who does otherwise, fails to imitate Camillus, and hence fails to defend himself. (D III.30)

Camillus here serves as a reminder that neither Savonarola nor Soderini, as Machiavelli notes elsewhere (P 6), commanded men at arms ready to preserve the laws and orders that they established or defended in the city. These Florentines therefore could not “imitate Camillus” and thus did not “defend themselves with ease” (D III.30); in fact, they were unable to defend themselves at all. Machiavelli, in his role as civil servant and advisor to Soderini, had previously offered the Gonfalonier the opportunity to command an extensive citizen militia. However, Soderini yielded to the charges of envious Florentine *ottimati* that Soderini wished to become a tyrant; the latter succeeded in watering down Machiavelli’s militia project and in keeping Soderini from exerting command over it.[6]

Returning to Camillus’s ordering of Rome’s military, especially his guarding of the senate and popular assembly during wartime: in an earlier chapter of the *Discourses*, Machiavelli describes the way that Camillus’s grandson—unidentified as such—treated conquered Latin cities, an account that sheds curious light on his forebear’s domestic ordering of Rome during wartime. Machiavelli’s description of the younger Camillus’s dealings with subject cities eerily presages his account in Book III, just discussed, of the elder Camillus’s treatment of Rome itself during frightful circumstances when the city confronted multiple foreign enemies. Machiavelli writes here that Camillus, “after compelling the Latins to surrender and place themselves in the Romans’ hands, *put guards* upon every town in Latium, took hostages from each of them, and, upon his return to Rome, reported to the senate that all Latium was now in the hands of the Roman people” (D II.23, emphasis added).

The conjunction of these two chapters (D III.30 and D II.23) seems to suggest the following regarding Machiavelli’s view of the elder Camillus’s leadership: in a moment when an unprecedented number of foreign enemies marched on Rome, Camillus’s consular colleagues readily surrendered all of their authority to him; moreover, Rome’s senators and people unhesitatingly permitted him to place them under armed guard, effectively making themselves his hostages. In short, Rome’s magistrates learned to defer to Camillus’s military virtue, and all of its citizens trusted his goodness to the extent that they were willing to let him treat them as conquered subjects. Machiavelli makes a Camillus declare on each of these occasion that, respectively, Rome’s subject cities and the republic itself are in the collective hands of Rome—when, in fact, the effectual truth is that they are under the direct control of no one but Camillus.

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22.3 Camillus Arouses Envy, Hatred, and Suspicion

I now range more widely through the *Discourses* to examine the circumstances and the conduct through which Camillus, over the course of his career: first, aroused envy, hatred, and suspicion among the Roman people such that they felt justified in exiling the dictator; and, second, how Camillus rehabilitated his reputation to such an extent that he eliminated the envy of other Roman citizens. Indeed, in the examples discussed in Section 22.2, Machiavelli shows how Rome's magistrates were willing to bestow upon him informal dictatorial authority, and Rome's senate and people were willing to let him treat them as conquered subjects (D III.30).

Machiavelli endorses Livy's characterization of Camillus as "an excellent man," one who maintained "the same spirit and dignity" in both good and ill fortune; an individual of "firm spirit" who neither departed from his "moderate mode of living," nor exhibited "drunken vanity" in success, such that others would consider him "intolerably hateful" (D III.31). To substantiate this assessment, Machiavelli directly quotes the words that Livy attributes to Camillus: "Neither did I ever permit the dictatorship to inflate my spirit nor allow my exile to extinguish it entirely."[7] The first part of this statement proves to be a considerable exaggeration. As Machiavelli's account of Camillus's early career demonstrates, the dictator did in fact permit a significant military victory to alter his spirit and comportment in a vain and extravagant manner such that he very much aroused the Roman people's envy, hatred, and suspicion.

Despite frequently invoking the fact, Machiavelli takes an exceedingly long time to explain exactly why Camillus was exiled to Ardea, and thus why the former dictator was absent from Rome at the moment when the republic needed him most; that is, when the Gauls routed Rome's armies, invaded and pillaged the city, and then besieged the Capitol. Camillus, Machiavelli writes, "was the one alone who would have remedied such an evil" (D II.29). Machiavelli waits until the middle of the third and final book of the *Discourses* to offer a specific explanation for why Camillus was exiled in the first place. While evaluating which modes of treating citizen-soldiers is more beneficial for a republic—Manlius Torquatus's severity or Valerius Corvinus's humanity—Machiavelli endorses the severe modes of Torquatus, which, he suggests, Camillus himself also employed early in his career (D III.22). The severity practiced by Torquatus, Machiavelli avers, "rarely offends" citizens and moreover arouses "little hatred" among them. However, the Florentine explains, Camillus's severity caused himself greater hatred than did Torquatus's because it also aroused "suspicion" among citizens; Camillus possessed "additional virtues" not exhibited by the virtuously severe Torquatus—virtues that enabled him to gain a "reputation" far greater than the dyspeptic and poorly spoken Torquatus himself could ever acquire. In order to clarify the relationship of severity and hatred, reputation, and suspicion ↳ in the case of Camillus, Machiavelli then embarks upon an entire chapter devoted to "The Causes of Camillus' Exile from Rome" (D III.23).

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Machiavelli begins the chapter by explaining why Camillus's severity caused offense and aroused hatred to an extent that never harmed Manlius Torquatus. The Florentine relies on Livy to emphasize the fact that the Romans never hated Camillus unequivocally: the people's hatred, however intense, was always accompanied by deep admiration (D III.23). Machiavelli and Livy agree that the Romans "both hated and marveled at" Camillus's virtue. They marveled at "how solicitously, prudently, with what great spirit and good order, he managed and commanded the army." However, the soldiers also hated "how much more severely" Camillus punished them for their failings than "how liberally he rewarded them" for their successes. And yet, of the three examples that Machiavelli draws from Livy to validate this claim, only two pertain to disproportionate displays of severity and liberality; moreover, these two examples do not fully address the issues of reputation and suspicion that Machiavelli raises at the end of the previous chapter.

Both instances pertaining to Camillus's excessive severity—or to what Machiavelli indicates is actually his insufficient liberality—occur immediately following Camillus's conquest of Veii: the dictator on two occasions denies his soldiers the spoils that they believe themselves to have rightfully earned in prosecuting and ending Rome's ten-year siege of the city. First, Machiavelli notes that Camillus assigns to public funds—which formally belong to the Roman people but which effectively fall under the custodial care of the Roman senate (D I.37)—booty that the soldiers wish to be distributed directly to themselves (D III.23). Skipping for a moment the second reason that, according to Machiavelli, the people began to hate Camillus, and moving on to the third: during his victory, the dictator also mistakenly failed (or conveniently forgot) to immediately set aside the tenth of the spoils that he'd vowed to devote to Apollo in exchange for victory. He therefore proposed that the soldiers, after the fact, individually give up a tenth of the spoils that they had secured for themselves (which, remember, was already much less than what they thought they deserved) in order to satisfy his pledge to the god.

In the first instance discussed above, Camillus prevents the soldiers from acquiring plunder that the latter believed that they had fully earned; in the second, he proposes "removing from their hands" booty that they already possessed (D III.23)—which, in Machiavelli's estimation, amounts to a much greater offense than the first. The Florentine here reprises an observation regarding hatred and property that he offered in *The Prince*: nothing aside from molesting the women of one's subjects arouses more hatred in them than overtaxing them economically (P 19). At this juncture in the *Discourses*, Machiavelli again declares that "a prince," even a prince in a republic, should never take from the hands of his citizen-soldiers things that they deem "useful" for meeting "the necessities" of life. Since these necessities confront them daily, they never forget such an act of deprivation, and thus they ever maintain—perhaps ever intensify—their hatred for the agent of this harmful dispossession (D III.23).

Sandwiched between these two examples in which severity takes the form of insufficient liberality—that is, occasions where Camillus seems to severely punish his soldiers *not* for their failure but rather for their obvious success—Machiavelli addresses the p. 420 ↳ aforementioned issue of hatred deriving from popular suspicion; specifically, suspicion for a citizen who acquires a great reputation by exercising his virtue. The Florentine describes how, in the triumph granted to Camillus by the senate for his victory at Veii, the dictator elected to have his chariot drawn by "four white horses" (D III.23). Machiavelli suggests that this unprecedentedly grandiose display implied that Camillus was so "prideful" as to "equate himself with the sun." Appearing to be so "sodden with pride" before a people, "especially a free people," Machiavelli insists, is certain to incur their hatred, even if such "prideful and pompous" behavior causes them no tangible harm.

Conversely, since such ostentatious displays afford no genuine "profit" to princes of republics such as Camillus, Machiavelli sternly advises the latter to avoid such "reckless and imprudent" behavior much as a ship should avoid "a shoal" (D III.23). Note that Machiavelli again employs the nautical simile of avoiding a shoal in reference to Camillus: in a *discorso*, examined before, Machiavelli affirms Camillus as a positive exemplar who successfully avoids the "shoal" of preparing the people for war in a disorderly fashion (D III.30); here the dictator serves as a negative exemplar who *failed* to avoid the shoal of vaingloriously aggrandizing himself before a free people. The implication is that Camillus eventually learned to accentuate those aspects of himself that citizen-soldiers genuinely admire (military prudence and solicitude) rather than those that they deeply resent (vanity and pride).

Indeed, as the example of Veii illustrates, Camillus was fully capable of conducting himself with solicitude and prudence in *securing* a military victory, but, in Machiavelli's estimation, he was not yet capable of doing so while *celebrating* it. In meting out, respectively, the spoils and the honors of victory, Camillus deprived his citizen-soldiers both materially and reputationally. To the dictator, and not his men, Camillus imprudently assumes, go the spoils and the glory of victory. Adding insult to injury, in his triumph, Camillus exalts himself to the status of the very god for whose veneration he sought to economically impoverish his soldiers. Thus, the Roman people became hateful of Camillus's actions, suspicious of his intentions for the future, and inclined to exile him not long after his conspicuously ostentatious triumph.

However, perhaps due to the admiration for Camillus's military virtue that, according to both Machiavelli and Livy, prevented the Roman people from ever fully hating the dictator,[8] they do not sentence him to death for his offenses; rather, they decide merely to fine and exile him. Thus, although distant from Rome in the hour of the republic's greatest need, Camillus was still available to be recalled in calamitous circumstances. The Roman people reveal themselves to be sufficiently prudent not to consider Camillus's offenses equivalent to the crime for which they will eventually execute Manlius Capitolinus: that is, for harboring "an unseemly greed for rule," i.e., greed for kingship (D III.8)—at least not as overtly as Manlius. Moreover, Camillus reveals himself to be sufficiently prudent neither to take vengeance on the Roman people for exiling him, as Coriolanus previously sought to do during his exile (D I.29), nor to simply ignore their plea when they call him back to save the city.

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22.4 Camillus Rehabilitates (and Expands) His Reputation for Prudence, Goodness, and Virtue

In an especially crucial chapter of the *Discourses*, Machiavelli refuses to count Camillus's famous exile from Rome as an example of unjustified ingratitude on the part of the Roman people (D I.29): Machiavelli suggests that it was not necessarily inappropriate for the Roman people to have exiled Camillus "for behavior injurious to the plebs"; and, in any case, he notes that the Roman people nevertheless recalled Camillus from exile, and thereafter "for the entirety of his life adored him as a prince" (D I.29). Certainly Camillus, by exhibiting no resentment toward the Roman people, and by rushing to rescue them from the Gauls, garnered their intense gratitude and adoration. However, what other aspects of Camillus's character and comportment, exhibited both before and especially after his exile, according to Machiavelli, induced the Romans to set aside their envy, hatred, and suspicion of the dictator, and to adore him as a prince in perpetuity?

Throughout the *Discourses*, Machiavelli accentuates Camillus's qualities and conduct that earn him the praise and admiration of fellow citizens and even foreign enemies. Machiavelli emphasizes, in particular: Camillus's use of religion to inspire his soldiers and increase the spoils of war (D I.13); his resort to manipulation and magnanimity in securing nearly bloodless military victories (III.20); and his exemplification of the Roman ways of conducting war through arms rather than through money (D III.30–31); and of training for battle during both wartime and peacetime (D III.31). Finally, as we have already observed, in the lengthy chapter that commences Book III, Machiavelli identifies Camillus's expulsion of the Gauls, and the concomitant abatement of envy for the dictator among Rome's citizens, as one of the instances that returned the city to its beginnings, and hence renewed the republic.

Machiavelli invokes Camillus as a "wise" and "prudent" man who maintained veneration for religion among the Romans, especially by exploiting piety when it proved salutary to the republic (D I.12). Machiavelli attributes to Camillus the reverence with which his soldiers entered Juno's temple during the conquest of Veii; and he praises the dictator for validating these soldiers' belief that the goddess's statue discernibly assented to their transporting her to Rome. However, as noted before, it is Camillus's own piety, whether sincere or feigned, that contributed to the dictator's growing unpopularity with the plebeians. Camillus had vowed, should he successfully end Rome's decade-long siege of Veii, to dedicate a tenth of the spoils to Apollo (D I.55). Yet, during the city's capture, Camillus failed to set aside the requisite amount of booty, and the plebs steadfastly defied the senate's decree that they voluntarily give up a tenth of their spoils in order to fulfill the dictator's pledge to the god. Perhaps with tongue in cheek, Machiavelli takes the plebs' indignant refusal to be tithed—rather than resort to any duplicity by defrauding Camillus, the senate,
p. 422 and Apollo himself during the collection of booty—as an indication ↳ of the people's "goodness and religiosity." One could reasonably justify the plebs' defiance here as an act of decency, but not very easily as an act of piety.

In any case, Machiavelli uses the example of Veii's conquest to establish his claim that Camillus was unequivocally "Rome's most prudent captain" (D III.12): in order to expedite his victory, Camillus shouts to his soldiers within earshot of the Veientes that no one lacking arms should be harmed; thus inducing the enemy soldiers to cast away all of their weapons, and enabling the Romans to earn a "nearly bloodless" victory. The extent to which Camillus's prudence was entwined with a certain inclination toward humanity is exemplified by another episode discussed by Machiavelli. While Camillus's troops besieged the Falisci in their city, the tutor of the city's noblest children snuck them outside the walls and offered them to Camillus as hostages that he could then use to ransom the Falisci's surrender (D III.20). Not only did Camillus reject "this gift," he immediately stripped the schoolmaster naked, and armed the children with rods to flog their tutor as they marched safely back into the city. Having witnessed Camillus's act of "humanity and integrity," in which he empowered young pupils to school their treasonous schoolmaster, the Falisci eagerly surrendered to the Romans—after which several other hostile cities sued for peace with Rome. Machiavelli takes this incident to confirm that "sometimes" men can be influenced more by "humanity and charity than by ferocity and violence."

No Machiavellian exemplar worthy of imitation should, of course, rely on love more than fear, or conciliation more than force; especially one, like Camillus, to whom the Florentine attributes the healthy quality of military severity. In this respect, Machiavelli endorses Livy's view that Camillus exemplifies Rome's commitment to the principle that virtue rather than money was the source of the republic's liberty and greatness (D II.30; cf. D III.10): as the starving Romans, besieged by the Gauls, were preparing to purchase their liberty from the latter in a servile manner, Camillus burst into the negotiations; throwing his sword on the scales, the dictator exclaimed that steel, not gold, would win Rome's salvation.[9] Camillus and his forces then proceeded to rout the French and liberate the city, earning for the dictator the title, "Second Founder of Rome."[10]

Camillus also figures prominently at a moment in the *Discourses* when Machiavelli reaffirms one of his preeminent principles concerning military and civic virtue: where there are good arms there are always good laws (P 12; D III.30). Machiavelli, apologizing for what readers might deem to be "superfluous repetition," again insists that "good laws are nonexistent where good arms are lacking" (D III.31). He then actually goes further in this regard than he does anywhere else in his writings by insisting that "nothing good whatsoever" obtains in the absence of good military orders. Building on arguments from the *Art of War*, Machiavelli reaffirms why an army comprised of citizens or subjects is potentially the greatest of all military forces. The best armies, Machiavelli argues, are those that are continually training for battle, and since it is impossible to be constantly at war, training must be conducted during times of peace. It is simply too expensive, he insists, to train any kind of military—whether mercenary or auxiliary—other than one p. 423 comprised of one's own people during peacetime. Camillus, for Machiavelli, exemplifies ↳ this fact. For when his soldiers feared the greatness of the Tuscan army amassed before them, Camillus marched through his camp calmly but firmly enjoining his soldiers simply "to do whatever they have been taught or trained to do"; thus restoring their confidence in "the ordering that they had received in both peace and war," and "dispelling from their minds" any fears that the Tuscan force was in any way their superior.

So important, Machiavelli insists, is the constant training afforded citizens and subjects in peacetime that no captain—not even a "new Hannibal"—could succeed without it (D III.31). Peacetime ordering for war characteristic of the Roman republic, he claims, instills within every soldier the virtuous modes of commanders like Camillus, which manifests itself in battle whether or not that captain is immediately in their presence. Since, "in every day of their lives," both individually and collectively, such citizens have "tested their own virtue against fortune's power" through military discipline and exercises, they have learned to maintain "the same dignity under any circumstance." Machiavelli insists that modern republics, like that of the Venetians—and presumably of the Florentines as well—consistently fail because they rely on fortune’s vagaries rather than on well-ordered military virtue, instilled not only occasionally during times of war but also continually in times of peace.

22.5 The Short-Lived Lifetime Gonfalonier and the Recurrently Reappointed King of Rome

I return to Machiavelli’s assertion that Soderini worried whether the Florentine people would maintain the office of Gonfalonier for Life beyond his tenure in office (D III.3). Soderini hesitated to employ “extraordinary authority” against the 1494 Republic’s enemies because he fretted over the longevity of his magistracy as much as, or more than, over his own life term within it. Machiavelli writes that Soderini was apprehensive about “terrifying the collectivity such that *after his death* it would never again *gather together* to make a lifetime Gonfalonier, an order that he judged good to keep and perpetuate” (D III.3, emphases added). This statement seems to be a direct gloss on the Gospel of Matthew, in which Christ declares that, after *his* death, “wherever two or three are *gathered together* in My name, there am I in their midst.”[11] The parallel of these two passages may signal Machiavelli’s sharp criticism of Soderini’s understanding of an afterlife. For whatever reason, Soderini associates the perpetuation of his name (his soul?) with the permanent maintenance of the chief executive office that he was the very first citizen to hold—Gonfalonier for Life. In Soderini’s own mind, he would, as it were, live forever as long as this office endured within his p. 424 republic. In this respect, Machiavelli seems to ↳ substantively, if subtly, contrast Soderini with Camillus, whom Machiavelli again deems “Rome’s most prudent Captain.”

Bracketing the most obvious differences between the two magistrates noted above—namely, that Camillus, unlike Soderini, withstands both internal conspiracies and foreign invasions—another perhaps not superficial contrast is this: Camillus exercised greater, indeed “extraordinary,” political authority and wider historical renown than Soderini did precisely because the Roman did *not* aspire after a life-tenured office. Camillus held dictatorial and consular authority multiple times, often renouncing such authority as quickly as he could; he consented to exile such that the Romans might call him back in their time of most urgent need; and, consequently, he earned eternal fame as “father of his country,” and “the second founder of Rome.” Soderini enjoys greater formal authority than Camillus—authority, Machiavelli intimates, comparable to that of a Roman king—but he fails to either exercise or maintain it effectively because he attempts to hold it obstinately, even desperately, in perpetuity. Camillus consistently and expeditiously gives up supreme authority over the Roman people, such that they repeatedly place themselves, like ransomed hostages or conquered subjects, under his authority (D III.1, D III.30).

This bespeaks poor thinking or impoverished imagination on Soderini’s part. Not only does Soderini lack the capacity to act cruelly or severely, he does not understand civic government institutionally. After all, it is not entirely clear whether Machiavelli thinks that a life-termed supreme magistracy is compatible with a healthy republic: the Roman kings, after all, were, elected for life—indeed, like Soderini, they were elected by the people, as Machiavelli makes it a point to emphasize in a chapter following his discussion of the Gonfalonier (D III.4)—and consequently they perhaps rather rapidly succumb to corruption. Moreover, the Venetian Doge, the institutional model for Florence’s life-termed Gonfalonier, is part of a constitutional model about which Machiavelli famously expresses serious hesitation (D I.36).

22.6 Conclusion

Machiavelli’s Camillus correctly anticipates (or perhaps confidently hopes) that humbly acceding to exile and quickly forsaking subsequent dictatorships would make the Romans comfortable with placing absolute power in his hands on successive occasions very late into his life—to the benefit of both the Roman Republic and its most prudent captain. Through Camillus’s interaction with the Roman people, Machiavelli demonstrates the mutual dependence of civic liberty and successful leadership within popular government—as well as the entwinement of liberty and leadership with indeterminacy, one might say with fortune. When accepting his exile, Camillus risks the possibility that the Roman people will never recall him to the patria; for their part, the Roman people later hazard the possibility that Camillus, after his return, will use his ever increasing civic-military authority to usurp their liberty and overthrow the republic. Camillus p. 425 repeatedly exhibits deference to the Roman people’s “internal prudence,” to their renewed ↳ ability to set aside envy and suspicion and “esteem good citizens for their virtue” (D III.1). Likewise, the people increasingly defer to Camillus’s goodness and virtue, assuming that the dictator will continue to place “the patria’s security” over his own pride when exercising his vast authority (D I.34).

Of course, these instances of deference need not have paid off for either the people’s liberty or the dictator’s majesty. Had the Romans not recalled Camillus from exile, and had they not placed unprecedented authority in his hands, they very likely would have been vanquished by their enemies, with the names of both Camillus and Rome disappearing from history. Had Camillus fully availed himself of the tantalizing opportunity to actually imprison the Roman senate and people, and formally declare himself king, then he would have become one among a long list of petty if virtuous tyrants in the history of the ancient Mediterranean—certainly not the “most prudent” statesman, the “second founder” of history’s most free and virtuous republic. By deferring to the judgment of the Roman people and bowing to sovereignty of contingency, Camillus wields greater power that any individual could hope to attain in a still civically virtuous republic—a form of power arguably superior to that of formal kingship. The Roman Republic and Furius Camillus become history’s most illustrious exemplars of civic liberty and civic leadership precisely because—not without risk of matters turning out otherwise—Roman citizens prudently learned to place “the full weight of the republic” on Camillus’s shoulders (D III.1), and he prudently learned to put his authority and reputation entirely “in the hands of the Roman people” (D II.23).

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Notes

1 Niccolò Machiavelli, *Il Principe* (*De Principatibus*), composed *c*. 1513 and published in 1532, ed. G. Inglese (Turin, Italy: Einaudi-Gallimard, 1995) (hereinafter P); and Machiavelli, *Discorsi*, composed *c.* 1513–1518 and published in 1531, ed. C. Vivanti (Turin, Italy: Einaudi-Gallimard, 1997) (hereinafter D).

2 See Leo Strauss, *Thoughts on Machiavelli* (Glencoe, IL: Free Press, 1958).

3 See Quentin Skinner, *Machiavelli: A Very Short Introduction* (Oxford: Oxford University Press, 2001); and J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, NJ: Princeton University Press, 1975).

4 See John P. McCormick, *Machiavellian Democracy* (Cambridge: Cambridge University Press, 2011); and John P. McCormick, *Reading Machiavelli: Scandalous Books, Suspect Engagements and the Virtue of Populist Politics* (Princeton, NJ: Princeton University Press, 2018).

5 See Marco Geuna, “Machiavelli and the Problem of Dictatorship,” *Ratio Juris* 28, no. 2 (2015): 226–241.

6 See John Najemy, “‘Occupare la tirannide’: Machiavelli, the Militia, and Guicciardini’s Accusation of Tyranny,” in *Della tirannia: Machiavelli con Bartolo, Quaderni di Rinascimento*, vol. 42, ed. J. Barthas (Florence, Italy: Leo S. Olschki, 2007), 75–108.

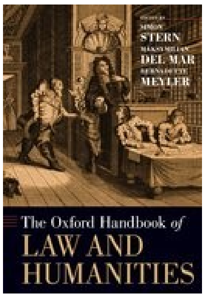
7 Livy VI.7.

8 D III.24; Livy V.26.

9 Livy V.49.

10 Livy V.49; Plutarch I.1.

11 Matthew 18:20.



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CHAPTER

23 Agonism, Democracy, and Law

Panu Minkkinen

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Abstract

This chapter begins by examining the origins of agonism in the German philosopher Friedrich Nietzsche's early text "Homer's Contest." It then attempts to formulate a political interpretation of agonism that could provide law and legal studies a post-Marxist and Nietzschean critical position in which democracy is central. A first attempt at the formulation is an analysis of the constitutional theorist Carl Schmitt's "antagonist" and "polemical" notion of politics that is based on a friend-enemy distinction, and of the consequences of such a notion for state constitutions and law. Schmitt serves as the background for the political theorist Chantal Mouffe, whose "agonistic pluralism" represents a conscious effort to moderate Schmitt's existentially belligerent critique of liberalism into a workable politics in late modernity. Interpretations of agonism provided by William E. Connolly and Bonnie Honig and their possible links to law and legal studies are then briefly discussed. The chapter concludes that there is a kinship between political agonism understood in this way and a contemporary strain in political theory represented by, for example, Jacques Rancière. The roots of this kinship are traced finally to a post-Marxist tradition of "radical liberalism."

Keywords: agonism, contest, politics, democracy, Nietzsche

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23.1 Introduction

OVER the past few decades or so, various approaches to agonism have received much attention in political theory and neighboring disciplines. Less so in legal studies even though agonism's central concern for democracy is central in law as well. The scarcity of engagements in law is, perhaps, all the more surprising because Carl Schmitt, German jurist, constitutional theorist, and controversial critic of liberalism, is widely considered to be a forerunner, a "proto-agonist," if you will, even if Schmitt's particular brand of "antagonism" is different as this chapter will also attempt to illustrate. In addition, the trial, or at least in its Anglo-American adversarial variety, could with good reason be regarded as a contemporary agonistic contest *par excellence*.[1]

Agonism can be defined as a theoretical position from which institutions, procedures, and principles reveal themselves through the political struggles and contestations that characterize them. So, for example, the distinguishing feature of law so understood would be the numerous interest conflicts that are managed and litigated by legal means rather than the mechanisms through which that management is executed. Moreover, and in political agonism in particular, the existence of these contestations is understood as a prerequisite of democracy. There can be no democracy without disagreement, this argument claims, and a society without disagreement is both impossible and undesirable. In this sense, agonism represents a challenge to the fundamental commitments of political liberalism, and in particular to the idea that the legitimacy of a political regime could somehow be inferred from a "deliberative" consensus among rational actors.

Because democracy is the thematic filter through which agonism is viewed here, other aspects will necessarily be bracketed out. My aim is twofold. After examining the philosophical origins of agonism, I will
p. 428 attempt to situate political agonism within ↳ the parameters of law and legal studies by drawing on insights from key theorists including Carl Schmitt, Chantal Mouffe, William E. Connolly, and Bonnie Honig. This perhaps conventional selection of key thinkers may imply a correspondingly conventional description of agonism itself. Indeed, the selection may serve those who are not familiar with the notion of agonism. But this is not my main aim. The specific interpretation that I am trying to defend here is embedded in the narrative undertow of the chapter. *Agonism in law, as it is understood in this chapter, is an attempt to capture a critical post-Marxist and Nietzschean position*, an attempt that should be seen against the dominant tradition of political liberalism in legal studies.

Martha Nussbaum, seemingly quite unaware of the antagonistic tone of her own intervention, has famously asserted that whatever contributions Friedrich Nietzsche may have made to moral psychology, he cannot be taken "seriously" as a political thinker.[2] Nussbaum's reservations are emblematic of how the liberal tradition sees Nietzsche and things Nietzschean, and how it positions itself in relation to agonism, as well. What should we, then, make of Nietzsche's influence on, say, Hannah Arendt?[3] Or Max Weber?[4] Are Arendt and Weber not "serious" political thinkers? So in this chapter I will also try to flesh out the Nietzschean undertow in agonism and to discuss its potential for developing a critical position that is decidedly post-Marxist. The advantages would seem to be obvious. By coupling democracy and interest conflicts to a theory of social and political struggles, agonism is a serious contender to liberal theories of law and politics because it provides a more fitting framework for understanding the democratic role of legal and political institutions in late modernity.

23.2 The Agon

The term "agonism" is derived from the Greek word ἀγών (*agōn*). Liddell and Scott's standard lexicon defines the word as "a gathering" or "an assembly," especially in relation to games, and more generally as "struggle" and "contest."[5] Indeed, the word was widely used for the games and contests, be they athletic or performative, that were organized in the various regions of ancient Greece and that eventually developed into the Panhellenic games at Olympia.[6]

p. 429 In 1872, Friedrich Nietzsche wrote a short essay called "Homer's Contest,"[7] usually regarded as one of his "early writings" before his unique brand of philosophy had developed into full maturity. It was published immediately after *The Birth of Tragedy*,[8] his first major work, and seemingly intended as an introduction to a new book. In the essay, the young professor at Basel is still reading his Greek texts with at least traces of the pedantry of a classical philologist although recognizable themes and angles are already present. Many regard the text as both a tribute to and maybe even a challenge to his colleague and mentor at Basel, the Swiss historian Jacob Burckhardt, who had used the centrality of the agon in Greek life as a way of depicting one of the major historical phases in the development of Hellenic culture.[9] And yet, at the same time, and clearly unlike his more reserved Swiss colleague, Nietzsche manages to extract from his sources an image of a dark pre-Homeric world the tensions of which are subsequently played out in the agonistic contest. Nietzsche warns us that because of our modern sensibilities, we tend to be too captivated by the elegance of the regulated contest itself. This warning is most likely Nietzsche's stab at Burckhardt. And so he insists that if we wish to understand the Greeks properly, we need to refocus our attention on the dark forces that the contest is meant regulate:

> Hellenic popular teaching commands that every talent must develop through a struggle: whereas modern educators fear nothing more than the unleashing of so-called ambition. Here, selfishness is feared as "evil as such". ... But for the ancients, the aim of agonistic education was the well-being of the whole, of state society.[10]

There are, perhaps, two points worth noting here. First, contrary to facile interpretations, Nietzsche is more interested in the regulated contest, that is, how a set of rules and practices manage to distinguish a victor, than in the brute force of an unregulated clash. The agon is, then, not an attempt to mask an unstructured confrontation. It is, rather, a way to channel the forces that are at play in the clash into a positive value. But second, and perhaps slightly contradicting the earlier point, he does ask an important question. If behavior
p. 430 in the contest is regulated, then we need to ask why. What are the forces that ↳ animate a behavior that seems to require regulation in the first place? This latter point is the "dark" pre-Homeric Greece that sets Nietzsche's reading apart from the classical philology of his time.

Walter Kaufmann went on to explain the development of the agon as a thematic preoccupation for Nietzsche in the following way:

> Nietzsche had previously considered the contest (*agon*) the most fruitful concept for any analysis of Greek culture. He had thought not only of the rivalry of the ancient dramatists who vied with each other for the highest prize, but also of the Olympic games and the Greek gymnasium; of Plato's effort to outdo the Sophists and the poets by composing more beautiful myths, speeches, and dialogues than they had ever conceived; and of the Socratic dialectic, which he understood as a spiritual contest. Now [in *Daybreak* from 1881] it occurred to him that the contest itself was a manifestation of the will to power.[11]

There is, then, clearly more at stake than just an isolated early text. The philosopher and Nietzsche scholar Christa Davis Acampora is one of the few who have dealt with Nietzsche's text as more than a mere curiosity or as just a way-station to Nietzsche's supposedly more mature philosophy. Unlike most readings, Acampora's elegant book *Contesting Nietzsche*[12] focuses on Nietzsche's essay, not only as part of a larger unfinished early project but also as evidence of the beginning of a recurring theme that Nietzsche returns to in different ways time and again. Through detailed close readings, she illustrates how the agon informs the development of Nietzsche's philosophy from the alleged "early writings" to the later concept of will to power. For Nietzsche, the essential aspect of the contest is not the annihilation of a contestant as a form of agency but, as Acampora argues, the production of social meaning and value in the form of a regulated struggle. And insofar as the regulated struggle can produce meaning, it becomes affirmable for human existence. Elsewhere Acampora explains:

> The *agon* provided Nietzsche with a graphic image of how meaning could be publicly produced and reproduced. Agonistic contest, for Nietzsche, is a potentially productive force that regulates without subjugating the interests of individuals, coordinating them without reducing them to the interests of the community, and provides a radical openness for the circulation of power that avoids ossification into tyranny.[13]

Once again, two points may be worth keeping in mind. First, in Acampora's reading, the agon is not merely a forerunner to will to power or a precursor to Nietzsche's more mature philosophy as, for example, p. 431 Kaufmann's interpretation suggests. As a theme, ↳ the agon extends from the early days of "Homer's Contest" to the better-known latter books and texts and is interlinked with Nietzsche's other major themes in more intricate and complex ways. Second, and perhaps more important, Acampora does not regard the agon as merely a thematic focus in Nietzsche's philosophy. It is also the template for his own "agonistic" engagement with the texts and characters that he chooses to take on.

Within the broader framework of political theory, agonism is, then, a particularly Nietzschean theme. It is both a thematic preoccupation with conflicting political interests and values and a way of engaging with a dominant tradition. And it is this Nietzschean motif that this chapter is trying to uncover.

23.3 Antagonism, Enemy, and Existential Threat

How does an agonistic Nietzschean position translate into something related to legal studies? It is once again worth noting that although some engagements with Nietzsche do exist in legal studies, none of them deal with the theme of agonism.[14] So the introduction of the agon would require a detour.

Carl Schmitt, German jurist, constitutional theorist, and unrelenting critic of liberalism, can be taken as our "proto-agonist," as the starting point of what we could call an agonistic theory of law despite the fact that Schmitt's Nietzschean affiliations are far from clear.[15] In addition, Schmitt will often be regarded as such a controversial figure that he is ill suited to provide any kind of critical framework for the analysis of modern democracy.[16] Such views will be informed by Schmitt's harsh criticism of the Weimar Republic and its constitutional arrangements as well as his highly dubious political involvement in the Nazi regime that earned him the nickname "Crown Jurist of the Third Reich."[17] But at the other end of the political spectrum, there has also been a revived interest in Schmitt's work among left-leaning political theorists like Chantal p. 432 Mouffe (who will be treated in more detail below in Section 23.4), Wendy Brown,[18] and ↳ Giorgio Agamben,[19] and sometimes through intermediate figures like Hannah Arendt and Max Weber.[20] What, however, unites the different positions is that they are all engaged in a debate about the shortcomings of political liberalism. And it is in his critique of political liberalism where Schmitt develops what might be understood as a prototype of an agonistic theory of law.

The central argument that Schmitt puts forward in his famous 1932 pamphlet *The Concept of the Political*[21] is fairly well-trodden territory: in order for something to be truly political, it must include within itself a distinction between friend and enemy. For our purposes here, it will be useful to begin with the following often-quoted passage:

> all political concepts, images, and terms have a polemical meaning. They are focused on a specific conflict and are bound to a concrete situation; the result (which manifests itself in war or revolution) is a friend-enemy grouping, and they turn into empty and ghostlike abstractions when this situation disappears. Words such as state, republic, society, class, as well as sovereignty, constitutional state, absolutism, dictatorship, economic planning, neutral or total state, and so on, are incomprehensible if one does not know exactly who is to be affected, combated, refuted, or negated by such a term.[22]

The friend-enemy distinction reveals itself, then, in the "polemical" nature of all politics.[23] A bit earlier in the text, Schmitt associates this polemical nature of politics with "antagonism": "The political is the most intense and extreme antagonism, and every concrete antagonism becomes that much more political the closer it approaches the most extreme point, that of the friend-enemy grouping. In its entirety the state as an organized political entity decides for itself the friend-enemy distinction."[24]

In other words, the friend-enemy distinction that Schmitt sets out as a precondition of true politics is an antagonistic encounter. Moreover, Schmitt speaks of "concepts, images, and terms." So what Schmitt means by the political does not only concern concepts like "democracy," "constitution," and "law" as theoretical categories. It also refers to imagery and less-than-conceptual expressions and notions. Think of, for example, the metaphorical power of the expression "we, the people" in the Preamble of the US p. 433 Constitution or, in its plural form, in the Preamble of the UN Charter.[25] In both cases, ↳ the expression identifies a "people" (or a community of "peoples") united by, perhaps, a common system of beliefs. The belief system is political inasmuch as the expression implies an "other" that does not belong to the "we" and that, by its mere existence, poses a threat to the unity and coherence of the "we." Hence antagonism and enmity, hence political.

Schmitt's understanding of the political is best exemplified through his main scholarly interest, namely, constitutions. For Schmitt, a constitution is never merely a collection of conceptually formalized laws that would define and delimit the competence of the state's political and legal institutions. This would be the standard claim of public law scholarship. A constitution will always include within itself an "existential" dimension[26] that Schmitt, in his monograph *Constitutional Theory* which is more or less contemporaneous with *The Concept of the Political*, elaborates with the help of the notion of an "absolute concept of the constitution." So what would an "absolute concept" imply?

As a "relative concept," the constitution would simply refer to the multitude of legal norms that have been legislated as constitutional norms. As such a multitude, these norms lack the "unity" that is characteristic of the constitution as an absolute concept.[27] The "absolute concept" is, then, Schmitt's reference to the concrete way in which constitutional norms come together to form a unity. So Schmitt seems to suggest that unity as "one" is specifically political by nature. Or, to be more exact, "unity" is always a reference to the "political unity of the people,"[28] the "peculiar form of existence … determined through the act of constitution making."[29] Individualized existence as a unity is, in other words, political existence that can be achieved by embedding the institutions and practices that are necessary for said existence in a constitution. Here we are not far from the idea of a "we, the people" that determines itself with the help of a set of constituted institutions and practices. Nevertheless, at this point the more specific meaning of the word "political" is still relatively formal. The only hint seems to be the unitary character of the whole: unity in relation to an "enemy" is what makes existence political. Later in the book Schmitt further elaborates that this unity is closely related to what he calls the "principle of identity," that is, the possibility of a people to recognize itself as a political unity insofar as "by virtue of its own political consciousness and national will, it has the capacity to distinguish friend and enemy."[30] So a people that has the will and the capacity to identify its enemy unifies itself according to the principle of identity and, consequently, exists in an antagonistic and political way.

Schmitt further distinguishes three dimensions in the absolute concept of the constitution. First, in its absolute sense, the constitution can be regarded as the concrete and collective precondition of the political unity and the social order of a given state. It is “some principle of unity and order, some decision-making p. 434 authority that is definitive in ↳ critical cases of conflicts of interest and power.”[31] This first dimension is, in other words, a reference to how sovereign power is organized and exercised within the state. Although Schmitt does not specifically mention sixteenth-century French jurist and state theorist Jean Bodin here, the idea is very close to Bodin’s notion of sovereignty as the absolute power that unifies the households of a realm into a single commonwealth.[32] The constitution may also refer to a particular political or social order or, in other words, to a specific way of governing and subjection that is indistinguishable from the political existence of the state. In this second absolute meaning, the constitution will be identical with, for example, monarchy, oligarchy, or democracy, or with the form of the state as the “form of forms.”[33] In this case, Schmitt’s reference to the form of the state as *forma formarum* may well be of Thomistic origin, and especially an allusion to the famous claim made by the German Renaissance scholar Nicholas of Cusa (1401–1464) about God as the “form of all forms,” as “*forma omnium formarum*.”[34] This interpretation seems to be aligned well with Schmitt’s own theological inspirations. Finally, the third dimension of the absolute concept of the constitution emphasizes the principle of the dynamic development of all political unities and the force and energy that enables this. For Schmitt, no political unity can remain static as the false etymology of the words “state” and “constitution” as *status* seems to imply. Any political unity, once established, must regenerate itself continuously: “Political unity must form itself daily out of various opposing interests, opinions, and aspirations. … The constitution is the active principle of a dynamic process of effective energies, an element of the becoming.”[35] So the etymology of “constitution” refers to the more complex *stasis* as a dynamic between a seemingly settled unity and its continuous regeneration, rather than a static *status*. The agonistic forces that are at play in the *stasis* are evident.[36]

Schmitt does, however, concede that the absolute concept of the constitution could also refer to “fundamental legal regulation” or, in other words, to the closed system of the hierarchically ultimate legal norms as a whole, to the constitution as the “norm of norms,”[37] or a “*norma normans non normata*.” This would be the position of standard constitutional theory.[38] Schmitt, of course, rejects this kind of pure p. 435 normativism because ↳ a constitution would consequently be regarded as valid merely because it has been correctly inferred from a formal competence. A constitution can, Schmitt insists, be valid only if, in addition to any formal criteria, it has been backed by a factual ability to constitute or, in other words, by a factual power or authority that makes the act of constituting possible to begin with. The constitution is created by the will of a “constitution-giving power,” and the word “will” is, for its part, an indication of a factually existing power as the source of a command: “The will is existentially present; its power or authority lies in its being.”[39] Understood politically, law is “concrete *will* and *command* and an act of sovereignty.”[40] In order to remain internally coherent, standard constitutional theory must remain silent about this political will that can actualize a legal norm into a valid command:

> The constitution in the positive sense originates from an *act of the constitution-making power*. The act of establishing a constitution as such involves not separate sets of norms. Instead, it determines the entirety of the political unity in regard to its peculiar form of existence through a single instance of decision. This act *constitutes* the form and type of the political unity, the existence of which is presupposed.[41]

Already in these preliminaries that frame the further analyses in *Constitutional Theory*, one can rather easily detect Schmitt’s own antagonistic confrontation with standard constitutional theory and the positivistic tradition of public law.[42] A constitution is, in other words, not simply the “charter” of the liberal *Rechtsstaat* that limits its own powers through constitutional competences. It is the outcome of a constitution-giving power through which the constituent subject—in the case of democracy “the people”—both establishes the institutions and practices that are essential for its political existence as a unified “one” and secures them against potential threats by identifying an enemy. Constitutional institutions and practices are, then, “constituted” for the very reason that political unity is potentially threatened by “enemies,” and it is the threat of such “enemies” that also makes constitutions political in Schmitt’s meaning of the word, and his more general notion of law antagonistic.

23.4 From Antagonistic Enemy to Agonistic Adversary

There are, then, two points that could cast doubt on Schmitt’s membership in the agonistic family. First, and if we are to stick with the undertow of this chapter, his Nietzschean affiliations are far from clear. The p. 436 few scattered references are anecdotal, ↳ indirect, or even critical. But Schmitt’s ideological links to the German “radical conservative” movement would certainly suggest a kinship.[43] Second, Schmitt never discusses agonism or the agon as such. His vocabulary is more centered on “antagonism” and “polemics.” But Schmitt’s contribution to agonism as its main legal representative is more apparent in the way in which his theory has been developed further by Belgian-born political theorist Chantal Mouffe who, without a doubt, would be regarded as one of the main representatives of contemporary agonistic theory.

Mouffe enters the agon from a perspective that is literally less “antagonistic” than Schmitt’s, but clearly in line with what we today understand by “agonism.” We can trace her theoretical pedigree to the post-Marxist notion of radical democracy that she developed in the 1980s together with her co-author Ernesto Laclau.[44] And from there on she has refined and expanded the theory into her own brand of “agonistic pluralism” which draws heavily on Schmitt.[45] But instead of dwelling on the usual platitudes about the political escapades of the “Crown Jurist,” Mouffe has transformed her Schmittian starting points into a leftist critique of neoliberalism in which the passion of and for politics is central: “Democratic politics cannot be limited to establishing compromises among interests or values or to deliberation about the common good; it needs to have a real purchase on people’s desires and fantasies.”[46]

Mouffe’s take on political liberalism can well be described as the “market model” of democracy. It is premised on the incompatibility of a truly democratic rule “by the people, for the people,” and the demands of large industrialized societies. As the complexity of such societies increases, so, too, do the contradictory interests and values that are embedded in them. In order to manage these complex combinations of contradictory interests and values, representative democracy would seem to provide a solution. The function of the democratic subject is to simply accept or to reject propositions that are put to it by the various interest groups. The result is an instrumentally bent variant of social stability, but one without values: “Individuals are portrayed as rational beings, driven by the maximization of their own interests and as acting in the political world in a basically instrumental way. It is the idea of the market applied to the domain of politics which is apprehended with concepts borrowed from economics.”[47] Mouffe then goes on to identify a critical position in relation to this type of instrumental variant of liberalism, a critique that can be said to be internal to liberalism itself: the tradition of deliberative democracy.[48] A deliberative critique, with its emphasis on establishing consensual agreement about contradictory interests and values through deliberation, is mainly concerned with the ethical vacuum that follows as a consequence from the forced stability of an instrumental notion of liberalism. What is, then, deliberative democracy as Mouffe sees it?

p. 437 In Mouffe’s view, the aim of democratic deliberation is to arrive at a consensual outcome that is both rational to the extent that it secures individual rights and democratic in that it allows for political self-determination. But the consensual outcome of the deliberation is never meant to question the foundations of liberal democracy itself. According to the rational consensus or the “covenant” that has been reached through deliberation, authority and the use of power must be publicly justified. But more important, reason and rationality are not merely instrumental notions as in how to accumulate and distribute national wealth in the most efficient way. They are also normative.

Mouffe discusses in more detail especially two problems that are related to this notion of deliberative democracy. First, deliberative democracy seems to downplay the fact that the plurality of interests and values in democracy will inevitably lead to antagonistic clashes that cannot be resolved through deliberation. Not every sociopolitical disagreement is resolvable to the extent that the needs of all parties can be adequately satisfied. Second, in order to secure the consensual outcome of deliberation, power must be bracketed away from the equation because forced consensus is an oxymoron. *Deliberative democracy is, then, a theory of democracy without power*. And so, as a form of critique, deliberative democracy substitutes the economic instrumentalism of traditional liberalism with ethics, but at the expense of politics.

This is not enough for Mouffe. She calls for a theory of democracy that would recognize the specific nature of politics. Such a theory must acknowledge the part that power and antagonisms caused by conflicting interests and values play in society:

> There are always other possibilities that have been repressed and that can be reactivated. The articulatory practices through which a certain order is established and the meaning of social institutions is fixed are "hegemonic practices." Every hegemonic order is susceptible of being challenged by counter-hegemonic practices, i.e. practices which will attempt to disarticulate the existing order so as to install another form of hegemony.[49]

These ever-present counter-hegemonic practices represent Mouffe's debt to Nietzsche, as well:

> some modes of life and some values are by definition incompatible with others and … it is this very exclusion which constitutes them. We have to take Nietzsche's idea of the "war of the gods" seriously and accept that, if there is no creation of an "us" without delimiting a "them," this relation may at any time become the site of an antagonism and the other may come to be perceived as an enemy.[50]

So power is not something to be subtracted away from political life as "unmanageable." Quite the contrary, power and power relations constitute society. Deliberation seeks to minimize the effects of power from political life, but it is more important to seek out ↳ forms of power that are more in tune with democratic values. The ideal of democracy is not, Mouffe insists, a completely peaceful society.

Democratic politics, in Mouffe's terms, does not, then, aim at an impossible consensus but, rather, the ability to recognize an adversary while at the same time respecting her right to defend her own interests and values. This is where Mouffe departs from Schmitt. The term "antagonism" depicts a battle between enemies, while "agonism" is a conflict between adversaries. So for Mouffe, the objective of democracy is to *transform social antagonism into political agonism*, "enemies" into "adversaries." The keys to such a political agonism are the pluralism of interests and values and passion as a driving force behind politics:

> By the "political," I refer to the dimension of antagonism that is inherent in human relations, antagonism that can take many forms and emerge in different types of social relations. "Politics," on the other side, indicates the ensemble of practices, discourses and institutions which seek to establish a certain order and organize human coexistence in conditions that are always potentially conflictual because they are affected by the dimension of "the political." I consider that it is only when we acknowledge the dimension of "the political" and understand that "politics" consists in domesticating hostility and in trying to defuse the potential antagonism that exists in human relations, that we can pose what I take to be the central question for democratic politics.[51]

Mouffe’s “agonistic adversary” resembles the way in which William E. Connolly describes “agonistic respect” as a “civic virtue that allows people to honor different final sources, to cultivate reciprocal respect across difference, and to negotiate larger assemblages to set general policies.”[52] Indeed, Connolly’s book *Identity\Difference* from 1991 can be regarded as one milestone in agonistic theory. Its affiliations with law are only indirect as it is more a theory about the politics of identity and difference, about the strained relationship between claims to some notion of the purity of a self-identity and the difference of an alter-identity called for by the very idea of democracy.

The democratic politics that might be able to address the strained relationship between self-identity and alter-identity Connolly calls agonistic democracy, that is, a “practice that affirms the indispensability of identity to life, disturbs the dogmatization of identity, and folds care for the protean diversity of human life into the strife and interdependence of identity\difference.”[53] Unlike the idealism of communitarian variants of democracy, agonistic democracy does not equate human dignity with rational consensus. Instead, it opens political spaces for agonistic relations of adversarial respect without fully exhausting the social. And p. 439 so it enables other modalities of attachment and detachment. One ↳ important way in which one can enhance human dignity is by cultivating Connolly’s idea of “agonistic respect.” The agonistic element of this reciprocal respect does, however, set it apart from conventional ideas of, say, deliberative democracy:

> the democratic contestation of settled identities and conventions can help to call forth a more robust affirmation of interdependence and strife in the politics of identity. Agonistic democracy, where each of these terms provides a necessary qualification to the other, furnishes the best political medium through which to incorporate strife into interdependence and care into strife. This virtue provides a powerful argument on behalf of democracy. It also provides considerations pertinent to the shape the ideal of democracy assumes in the late-modern age.[54]

Bonnie Honig’s *Political Theory and the Displacement of Politics* from 1993, another milestone in the agonistic literature, is for the most part an elaboration of what she calls *virtù* theories of politics, that is, theories that view politics as a “disruptive practice that resists the consolidations and closures of administrative and juridical settlement for the sake of the perpetuity of political contest.”[55] Her main interlocutors in this discussion are Nietzsche and Hannah Arendt. In the introductory chapter of the book, Honig does, however, give an excellent illustration of what it would mean if law was understood through the agonistic scheme of *virtù* politics. At the time of writing the book, the US Supreme Court had just reaffirmed a woman’s constitutional right to abort a pregnancy, originally recognized in *Roe v. Wade* in 1973. But the decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey* from 1992 imposed significant new restrictions to this right. Honig notes the surprise with which those who had originally fought for the right now had to acknowledge that the issue was once again being contested. In the meanwhile, after *Roe v. Wade*, advocates of the pro-life position had managed to redefine abortion as “killing” and the opposing pro-choice position itself as “anti-family.” The lesson to be learned from this was that the agon in which the right to abortion had first been contested and won could not be shut down and stabilized with law. Indeed, that is not what law can do. The belief that a contentious political issue such as the right to abortion could be settled by law without remainder had ceded the agon to the pro-life movement and shifted the debate accordingly. One can—and should—embed rights in law, Honig stresses, but at the same time, one must also acknowledge *the perpetuity of the agonistic contest*:

> To affirm the perpetuity of contest is not to celebrate a world without points of stabilization; it is to affirm the reality of perpetual contest, even within an ordered setting, and to identify the p. 440 affirmative dimensions of contestation. It is to see that ↳ the always imperfect closure of political space tends to engender remainders and that, if those remainders are not engaged, they may return to haunt and destabilize the very closures that deny their existence. It is to treat rights and law as a part of political contest rather than as the instruments of its closure. It is to see that

> attempts to shut down the agon perpetually fail, that the best (or worst) they do is to displace polities onto other sites and topics, where the struggle of identity and difference, resistance and closure, is then repeated.[56]

Honig has returned to issues related to law in a number of books where her agonistic template is, perhaps, detectable between the lines rather than at the surface level of the text.[57] But in one of her more recent books, she takes on another relevant aspect to agonism. *Antigone, Interrupted*[58] is a complex and multifaceted reading and interpretation of Sophocle's tragedy bringing it masterfully together with "conspirators" such as Arendt, Jacques Derrida, and Judith Butler. The main theme of the book is the politics of lament and mourning, but in the context of this chapter, its opening chapter is informative in that it explores and expands on familiar agonistic themes.

Honig demonstrates how the familiar figure of Antigone represents a contemporary variant of humanism that focuses on vulnerability and suffering as something that is common to human existence. This would be evident in, for example, the way in which Antigone is portrayed as the heroic victim of Creon's might. Honig criticizes such a "mortalist" notion of humanism because it is both disempowering and politically incapacitating. No stranger to Nietzsche, Honig proceeds to show how the tragedy can also be read in the light of a life-affirming and almost vitalistic agonism by refocusing the interpretation on, for example, Antigone's contempt for her sister Ismene's cowardice. For Honig, this is a "different humanism—an agonistic humanism—that might better inspire progressive democratic imaginations than common receptions of this ancient heroine as mortal (death-identified) or maternal (and mournful)."[59]

23.5 Between Actuality and Potentiality

There is no doubt that there is also a kinship between agonism and certain forms of contemporary leftist political theory, especially of the French kind. Jacques Rancière, to take one prominent example, clearly thinks within similar parameters of disagreement and "dissensus":

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> disagreement is not only an object of my theorization. It is also its method. Addressing an author or a concept first means to me setting the stage for a disagreement, testing an operator of difference. This also means that my theoretical operations are always aimed at reframing the configuration of a problem.[60]

But even in the light of the radicalness of the theorists I have in mind,[61] it would, I believe, be misleading to characterize agonistic accounts of politics and society as "Marxist" despite the fact that they focus on the social and political struggles of capitalist societies. While the starting points of Anglo-American agonists like Connolly and Honig often involve "existential" (read: "Nietzschean") interpretations of Hannah Arendt's political philosophy,[62] many of agonism's contemporary continental European advocates like Mouffe and Rancière have, despite their Marxist roots, developed their positions into something decidedly more "post-Marxist."[63]

If one wanted to capture the two starting points in a single idiom, I would be tempted to say that they both originate from a European idea of what I might call "radical liberalism," a Nietzschean position represented by, among others, the hugely influential but also neglected French sociologist and social theorist Raymond Aron.[64] Not only is Aron himself a direct influence for many of these contemporary French agonists, but through his philosophical readings of classic social theory,[65] his Nietzsche is filtered and refined through intermediate figures like Max Weber. As such, Aron participates in a lineage of radical liberalism that could well cover agonism's more Anglo-American tradition as well.

Indeed, Aurelian Craiutu claims that although Aron's brand of liberalism is at heart a "doctrine of political moderation," it also has a distinctively eclectic ring to it providing it with both richness and enduring relevance. The eclecticism is a result from Aron's p. 442 ↳ attempts to combine two seemingly contradictory traditions that Craiutu calls the perfectionist and the agonistic strands of liberalism:

> The perfectionist strand is demonstrated by [Aron's] belief that social and political institutions can and should create the conditions for the harmonious moral and intellectual development of individuals in accord with the progress of civilization. The agonistic strand stems from [his] belief that, since political institutions are the result of both historical contingency and conscious design, rights and liberties can never be fixed, being the outcome of political conflict and various political settlements.[66]

This "eclectic combination" of "perfectionist" progress and "agonistic" contingency illustrates well the reasons why Nietzsche's contest is always able to produce positive values. Social and political values, be they institutionally embedded in constitutions, laws, or otherwise, are never in a freefalling flux even if this may seem to be the case if viewed from a particular moment in history. There are also moments when they enjoy relative success. Honig's example of *Roe v. Wade* is instructive. But a value that is currently actualized as a right does not guarantee that it will never be challenged. Conversely, a political defeat is always a setback, and as such, it also marks the potential reinstatement of the value that was lost. In the agonistic contest, these values can only reach a strained existence between actuality and potentiality.

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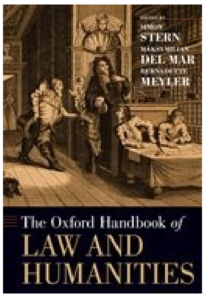

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CHAPTER

24 An Anti-Liberal Defense of Free Speech: Foundations of Democracy in the Western Philosophical Canon

Eric Heinze

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Abstract

Western democracies have determined the extent and limits of free expression largely within rights-based frameworks. As captured by Mill’s classically liberal “harm principle,” expression is permitted except insofar as legislatures and courts deem it to cause some unacceptable harm. Through a review of certain texts foundational for democracy, however, we can identify principles different from the standard liberal principles. Beginning in ancient Athens, we discover that questions of legal legitimacy invariably become questions of civic participation; and civic participation is nothing if not expression. It is no exaggeration to suggest that Western political philosophy altogether begins with that observation: Plato’s *Crito* presents the West’s first systematic inquiry into the question of legal legitimacy—that is, the question of when the law can bind us through moral rightness, beyond sheer physical coercion. The law binds us precisely to the extent of the freedom we have enjoyed to disagree with it.

Keywords: Aristotle, democracy, Dworkin, free expression, Habermas, liberalism, Mill, Plato, Rousseau

Subject: Jurisprudence and Philosophy of Law, Law and Society, Law

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24.1 Introduction

“THE freedom which we enjoy in our government extends also to our ordinary life,”[1] boasts Pericles in the fifth century BCE, as if anticipating the famous “harm principle” over two millennia before Mill[2]: “we do not feel called upon to be angry with our neighbor for doing what he likes.”[3] Several decades after Pericles, Plato too will marvel that citizens of a democracy are “free,” their society “full of freedom and freedom of speech.”[4]

But there is a difference. Plato is not bragging about democracy but mocking it. He pours scorn on “the democratic man” yielding “day by day to the desire at hand”: “Sometimes he drinks heavily while listening to the flute; at other times, he drinks only water and is on a diet; sometimes he goes in for physical training; at other times, he’s idle and neglects everything …. He often engages in politics, leaping up from his seat and p. 444 ↳ saying and doing whatever comes into his mind. […] There’s neither order nor necessity in his life, but he calls it pleasant, free, and blessedly happy.”[5]

That seemingly lighthearted caricature takes on somber hues. In Plato’s *Gorgias* free speech undoes a democracy. Springing ahead of both de Tocqueville[6] and Mill,[7] Plato suggests that free speech, far from ensuring democracy’s triumph over tyranny, fuels the tyranny of the majority—rather, the tyranny of the few with wealth enough to manipulate the masses. Socrates’s interlocutors Polus and Callicles, two all-too-cleverly trained pupils of one of Greece’s famous rhetoric instructors, announce a manifesto for fake news making Goebbels seem amateurish by comparison.

Has the West today moved beyond Pericles-*versus*-Plato—beyond speech as freedom versus speech as danger? In this chapter I come down on the side of Pericles, yet with Plato, antiquity’s great foe of free speech, as my ally. Despite, or indeed by virtue of, being the West’s eminent dialectician, Plato grasps the power but also the risks of free speech, which largely explains his abandonment of democracy in two disappointingly un-dialectical works, the *Republic* and *Laws*. His mentor Socrates would be sentenced to death for crimes of speech; yet more than any other Western philosopher, Plato’s writings take conversational form. It is precisely in assessing the risks of speech that Plato surpasses even Mill in grasping free speech as constitutive of self-government. It is through Plato’s warnings about speech that I shall propose a model for modern democracies: active in combatting inequality and exclusion, yet refraining from penalties upon citizens who, even crudely, dissent from that pluralist ethos.

24.2 The Prerogative of Citizenship

Pericles vaunts meritocracy among democracy’s strengths. Individual achievement prevails over class status, trumping expectations of birth as destiny, that is widespread in history:

> [W]e are called a democracy …. But while there exists equal justice to all and alike in their private disputes, the claim of excellence is also recognized; and when a citizen is in any way distinguished, he is preferred to the public service, not as a matter of privilege, but as the reward of merit …. [A] man may benefit his country whatever the obscurity of his condition.[8]

On closer scrutiny, however, problems arise—if not for Athenians then certainly for us. The concept of citizenship is by definition restrictive. It create entitlements from which p. 445 ↳ some individuals are barred, such as foreigners or resident aliens. First, in Athens, the full-fledged citizen is male. Even women born to the citizen class are denied privileges of political participation. Second, he is indigenous, in contrast to slaves or residents hailing from outside Athens. Slaves may at times be freed but remain barred from the citizen class and no naturalization exists for aliens. Once we aggregate women, slaves, aliens, and minors, male citizens represent a fraction of the population. To practice Athenian democracy is *eo ipso* to entrench patriarchal, class-based privilege.[9]

Today’s democracies have formally legislated women’s full citizenship and the abolition of slavery, but class and status differences abound. Given the wealth generated within post-industrial economies, our gaps between rich and poor are wider than in Athens. The small size of any Greek polis, even the comparatively larger Athens, did promote greater equality of opportunity within the male citizen class. On Plato’s account, however, formal citizen equality by no means overcomes class difference. A wealthy elite, unlike the poor even among the citizen class, enjoys the time and means to purchase the best education, including instruction in rhetoric, wielding a power over public discourse that manipulates citizens to vote contrary to the common weal, including votes for wars with Sparta that debilitate Athens.

Plato certainly adopts a “marketplace” model of expression, yet opposite to Mill’s (neither uses that specific term). Mirroring rapidly expanding markets, Mill would look optimistically toward a public sphere in which superior ideas outcompete inferior ones. Britain had witnessed three mutually reinforcing developments in the nineteenth century. *Scientific positivism* viewed the best idea as emerging from the free competition of conflicting hypotheses. *Darwinism*, notably as translated into overtly social terms by figures such as Herbert Spencer (“social Darwinism”), presented competition as salutary, with the best species and the best humans emerging from competition among natural and social forces. *Laissez-faire* economic ideas viewed the best economic products as emerging from the free competition of rival market forces (even through Mill did favor some regulation). An open marketplace of speech becomes as productive as the open marketplace of goods and services.[10]

Plato’s marketplace model emerges, by contrast, as Athens is waning, devastated by a war that Plato ascribes to the power of wealth to corrupt private incentives and public discourse. The unbridled marketplace of speech becomes, for Plato, as damaging as the unbridled marketplace of goods and services. Worries in our own time about dangerous expression have partly shifted, from economic to identity-based models, with a focus on hate speech, glorification of terrorism, and other forms of extreme expression.[11] Still, that shift is more modular than categorical. Within our own recent memory lie Plato’s concerns, such
p. 446 as the deployment of media to mobilize mass atrocities in Nazi Germany, ↳ Rwanda, or the former
Yugoslavia.[12] Contemporary democracies may have stronger internal means of avoiding such extremes, but today’s advocates of bans fear that extreme speech can spur acts of violence and discrimination.[13]

24.3 Free Speech and Political Legitimacy

Before the twentieth century the *Republic*’s ideal society was faulted at worst for utopianism and impracticality. Only with the emergence of industrial-scale totalitarianism did Plato’s elite-managerial model emerge as the font of all Western evils, as in Karl Popper’s subtle analysis[14] or Bertrand Russell’s cruder one.[15] Scholars have subsequently challenged that “Plato *ergo* Hitler” reductionism; yet Plato the Censor, chasing the poets from his ideal polis, looms so large that we rarely turn to Plato for defenses of free speech.

Assume that a society can be called non-ideal insofar as injustice is inadequately redressed. Questions of legitimacy and obedience then arise: do citizens owe obedience to law despite its injustices? In both the *Republic* and *Laws*, Plato sketches a “most just” society aiming to avoid that question from the outset: a society delivering the greatest possible substantive justice would presumably command obedience by definition, raising no distinct question of legitimacy. No dissident could disobey on grounds that, in view of one or another bad law or act of government, the society may *not* be the most just. If the society is constructed from the outset as the most just then the dissident by definition always ends up wrong.

No such tidy solution is sought in *Crito*. The distinct question of legitimacy—of a justified expectation of obedience even to unjust laws or acts of government—does arise. The context is not a postulated society, but real-world Athens. Socrates has been tried and sentenced on grounds of his participation within public discourse, including blasphemy (“impiety”) offenses. Rejection of conventional Greek religion was common in Athens without such prosecutions being brought. Socrates is resented, however, by democrats believing his challenges had influenced some disciples who later betrayed Attica. The victorious Spartans briefly
p. 447 abolish democracy, installing the “Thirty Tyrants.”[16] ↳ Many Athenians know the prosecution amounts to
sheer revenge.[17] The three charges are corrupting the youth, rejecting Athenian gods, and inventing new ones.[18] As Socrates awaits his execution, Crito visits him in prison, explaining plans for his escape. They

take up the problem of disobedience, which we can frame as follows. First, do we owe obedience to a regime that is not pervasively unjust[19]; second, assuming we do, may we nevertheless justifiably disobey a particular unjust law?

Socrates imagines the “personified” Laws of Athens appearing in the form of a god. Can he persuade the Laws that the injustice done to him warrants escape? Lancing a kind of “estoppel” or “tacit consent” claim, the Laws challenge him:

> “Did we [Laws] not, first, bring you to birth, and was it not through us that your father married your mother and begat you? […] Tell [us], do you find anything to criticize in those of us [laws] who are concerned with marriage […] [o]r in those [laws] concerned with the nurture of babies and the education that you too received?” […] [Y]ou do not realize that your country is to be honored more than your mother, your father, and all your ancestors?”[20]

Yet Socrates’s duty to obey is not as absolute as that exhortation suggests. It emerges as a choice. “You must either persuade [the polis] or obey its orders.”[21] Sometimes misread as prescribing blind obedience even to unjust law,[22] a reading surely spurred by assumptions of a “totalitarian” Plato, *Crito*’s fourfold reiteration of that “persuade or obey” injunction instead implies that obedience is *not* required when the laws have failed to safeguard the citizen’s opportunity to speak. In the *Republic* and *Laws*, “persuade or obey” is dropped, Plato’s debt to free speech translating solely as a privilege for ruling elites. In *Crito*, by contrast, free speech within public discourse, at least for the class of full-fledged citizens, constitutes democracy in a sense not temporally but rather conceptually prior to the very possibility of a legitimate regime of positive law.[23] Free speech figures not merely, as it does today, as one among a checklist of “human rights.” It becomes not merely an important “interest” *within* an already constituted order but itself becomes constitutive *of* that order. The citizen’s prerogative of participation within public discourse becomes the condition for democratic legitimacy in a fully deontological and contractarian sense.

Today we might recognize that insight as broadly Habermasian. For Habermas, “co-originally” constitutive participation entails both individual private rights and rights of public participation. Yet those end up juridically subsumed by an otherwise conventional, positive law right of free speech, no less but also no greater in stature than other ↳ human rights.[24] Habermas’s sociology and ethics of foundational communication[25] fail to translate into any *legal* model of public discourse as constitutionally foundational, that is, as constitutive of the very possibility *of* a democratic constitution. p. 448

Mill envisages an epistemological model of speech as a foundation for knowledge, as opposed to a specifically political model of speech as a necessary condition for legitimacy. *On Liberty* by no means assumes democracy. The monarchy of Louis XIV surely hosted more free speech than post-revolutionary democracy in Massachusetts.[26] *Crito* goes further than Mill and even Habermas in conditioning obedience on the opportunity to persuade. Public discourse becomes, conceptually if not temporally, pre-constitutional. It becomes the democratic *Urverfassung*, the constitution of the democratic constitution.[27]

24.4 Formalizing *Crito*’s Principle

I shall formulate *Crito*’s principle of democratic legitimacy in a rule: *an individual owes a duty of civic obedience insofar as that individual had a sufficient opportunity to participate in public deliberation*. That opportunity to participate lends the legal system presumptive legitimacy. But some clarification is essential.

First, that formula assumes a distinction between “civic” and “moral” obedience. Consider a citizen of a pervasively unjust regime like North Korea under the Kim dynasty.[28] That individual is barred from meaningful political participation, but not therefore justified in undertaking all and sundry disobedient

acts, such as murder, brawling, or other conduct harmful to innocent third parties. Without here adopting a general theory of justice—deciding whether justice grounds in conventionalism, deontology, utilitarianism, virtue ethics, religion, phenomenology, intuitionism, or some other basis—I shall simply stipulate that, under *Crito*, any such duty of care to third parties is owed *only* as a moral matter. It is not owed as part of any duty toward the regime as such. Even if we were to find a North Korean subjected to a seemingly fair trial for murder of an innocent private citizen, any such qualification of "fair" would assume criteria of justice over which that citizen has no say. Observing from outside, we may well deem the trial fair as a *moral* matter. But it cannot be called fair as a civic matter, that is, as the product of a public sphere admitting open discussion
p. 449 *about* fair trials. The North Korean ↳ retains both a moral duty and a purely positive-law duty to refrain from killing innocent third parties, but no civic duty, no legitimately legal duty to do so. Athenians' duties to refrain from harming others are, by contrast, civic as well as moral.

Second, we must clarify what counts as a sufficient opportunity to participate in public deliberation. My vote for a political representative, even if my candidate wins, in no way guarantees that my political views will be aired. However, "persuade or obey" by no means pre-supposes Athenian direct democracy. Socrates does not categorically condemn office holding or direct voting in assemblies, yet he doubts they pave the main pathways to justice. The crucial legal norms are rooted, according to his view, in social values. The most powerful form of political participation lies with the opportunity to challenge fellow citizens' attitudes directly.[29]

To be sure, "sufficient opportunity" does not equate with "equal opportunity." Wealthy voices are invariably stronger.[30] Critical theory has underscored the ways in which purely formal rights may allow only limited access for disempowered groups.[31] "Sufficient opportunity" certainly creates gray areas; what cannot be denied, however, are contexts that are clearly black or white: for Socrates opportunities were amply available; in totalitarianism they are amply denied. In our own time, efforts to equalize access to the public sphere characterize societies that rate strongest on democratic indicators.[32] But a bare minimum of democratic legitimacy is that no one is excluded solely on grounds of a world view deemed to be undesirable or provocative.[33]

Third, the duty to obey insofar as one has had an adequate opportunity to participate in public deliberation constitutes only a necessary condition, not a sufficient condition for civic obedience. Some theorists might certainly proffer further grounds for legitimate disobedience even if citizens *have* had that opportunity to participate. However, as the present inquiry concerns only a minimum foundation for legitimacy in free speech, and not other possible foundations, such speculation need not be pursued here.

Fourth, the opportunity to participate in public deliberation is not existentially more important than food, water, or other essential goods; however, our interests in those goods does not distinctly legitimate democracy. Monarchies and dictatorships need food and water just as much as democracies. Food and water are essential to life but are not themselves the medium of law as is speech. Law consists not of bread or water but of words. Speech is not something merely to be put on the table like any other object of regulation. To regulate speech is to regulate the possibility of all regulation. In a democracy, a law regulating speech is a law about the possibility of legitimate law.

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24.5 From Deontology to Virtue Ethics

Free expression may distinctly constitute democracy, but that observation in no way counters Plato's concerns about the risks of speech. The *Republic* eliminates citizen participation and the *Laws* subordinate it in favor of elite control. Aristotle grasps his teacher's diagnosis but seeks a solution that avoids those works' elimination of citizen participation. Open, public deliberation remains vital to policy formation, but it must not serve a sheer vote-chasing exercise. In lieu of voting-based democracy, Aristotle proposes a regime of rotating service: citizens will "rule and [be] ruled in turn."[34] Aristotle views amity (φιλία) among citizens as a vital priority,[35] which might lead us to believe his views support hate speech bans. Far from counseling censorship, however, Aristotle insists that citizens must actively practice "persuasion … on opposite sides of a question"[36] in order to expose falsehoods and abuses: "if another man argues unfairly, we on our part may be able to confute him."[37]

Aristotle's marketplace is more Millian than Plato's, yet in a world opposite to Mill's industrial-era empire. Aristotle's communal deliberation remains within the demographic and geographic bounds of a Greek polis tiny by today's standards, ensuring that citizens' voices carry (relatively) more equal weight. The rare modern state no larger in territory or population than Liechtenstein or San Marino might approximate Aristotle's prescribed dimensions[38]; even Denmark or Switzerland would be too large. Once the bounds of the polis are exceeded through a society overgrown, individuals dissolve into anonymity and alienation (a process Rousseau and Hegel would later compare to Rome's transition from republic to empire). Aristotle's marketplace may well serve Mill's epistemological aims, but Mill's marketplace cannot serve Aristotle's political aims.

The pre-industrial society faces a dilemma. To remain citizen-based and collectively deliberative, it must retain a small size, leaving it economically and militarily vulnerable; to strengthen its military and economic security, it must grow to sizes that undermine citizens' voices. In our post-industrial age, that standoff has not necessarily been overcome. Printed and electronic communications certainly allow quantitatively greater exchanges of words as such, but for Aristotle civic deliberation was never about sheer volleys of disembodied words. His citizens must maintain sufficient interpersonal familiarity to ensure that public discourse emerges within strong perceptions of a collaborative political enterprise.

Still, given the more integrated role of public discourse within Aristotle's political order, in contrast to *Crito*'s democracy rejected in Plato's *Republic* or *Laws*, why bother with Plato at all? Why not just adopt Aristotle as our point of departure? Aristotle p. 451 ↳ advises against disobedience, at least within his model regime,[39] never adopting any categorical principle of "persuade or obey." He never stipulates access to public discourse as a necessary condition for law's legitimacy, for law's command of obedience. Aristotle's model of citizen participation remains persuasive, but *Crito*'s principle of legitimacy remains unparalleled.

24.6 The Return to Contractarianism

After Aristotle, world history scarcely progresses toward the model of the Greek polis. Confucianism, Judaism, Hinduism, Christianity, Islam, Buddhism, and other traditions may well urge individuals exercising authority to consult among subjects or citizens; however, a sheer discretion to consult entails a discretion to determine who speaks for whom, and when sufficient consultation has been achieved. None of those traditions commands consultation with each and every legal subject, which would be a logistical impossibility.

As Europe later emerges from the Middle Ages, and standing at the transition into early modern law and politics, Shakespeare displays both the powers and the perils of speech. He portrays power in many forms—

monarchical, aristocratic, clerical, mercantile. His portrayal of law as an instrument of power unsurprisingly emphasizes its distinctly verbal element, conspicuous in a world in which populations remain widely illiterate. *Henry VI*, Part Two underscores the alienation of peasants and workers from law's seemingly elite linguistic complexity.[40] Shakespeare displays powerful figures ensnared by their own speech[41] or writing,[42] recalling the spying networks deployed under Elizabeth I to charge the Scottish Queen Mary Stuart with treason. *Othello*'s Iago, *Cymbeline*'s Giacomo, *Much Ado*'s Don John, or *Richard III*'s eponymous hero all recall the "poison" of false, misleading and manipulated words.[43] The power of false report to misguide political action launches *Henry IV*, Part Two.[44] The theatrical power of language also comes in for scrutiny, most famously in *Henry V*, which incessantly calls our attention to the staged character of the events,[45] underscoring Henry's success in wielding power through strategic speech.

There is a proto-liberal irony in those portrayals of hazardous speech. Early modern writers like Rabelais, p. 452 Marlowe, Fletcher, Middleton, Corneille, Racine, or Milton similarly ↳ show how stories need simply be clothed in the veneer of some ancient, legendary, biblical, exotic, or confabulated time and place in order then to proceed with altogether contemporary political commentary. In *Don Juan* or *Tartuffe*, Molière can take a step further, shaking off such cosmetic displacements, lampooning aristocracy and clergy in altogether contemporary settings. Voltaire and Beaumarchais (plus Mozart) will push free speech yet further. To be sure, Voltaire never actually says, "I disagree with what you say, but will defend to the death your right to say it." His 1906 biographer Evelyn Beatrice Hall would coin the adage[46] in an attempt to capture a kind of Voltairian spirit—not unworthily, except for the word "right." Nowhere does the avowed monarchist advocate a general right of free speech. Still, his political satire would keep educated Europeans giggling and outraged in equal measure.

Like Athens, the Enlightenment too delivers a theory of free speech where we least expect it. We don't look for it in the censorious Plato and therefore risk missing it in *Crito*; we don't look for it in the censorious Rousseau, so we risk missing it in the *Social Contract*. Particularly in the Anglophone world Rousseau has preposterously been blamed for the Jacobin terror, and then in the twentieth century chucked together with Plato in the wave of seeking totalitarian origins in pre-industrial thought.[47] Ian Cram notes commonly cited reasons to turn to Rousseau, as to Plato, last of all for arguments supporting free speech:

> In *Emile* [Rousseau] advocates the removal of popular children's fiction from the education of young people on account of its tendency to corrupt students. He sees art and literature as dependent upon patronage by the wealthy and concerned to please existing tastes and fashions rather than educate and improve the moral qualities of the audience.[48]

Yet the suggestion that "Rousseau's reputation for supporting a variety of forms of censorship is well-documented"[49] rests to some degree on the old chestnut of mistaking moral condemnation for advocacy of legal penalties. Rousseau disapproves of much writing and art, certainly deeming much of it contrary to his ideal society, but never demands penalties for his contemporaries and indeed incurs a few himself. He notes the irony of his own endeavors in the very genres he condemns, such as theatre, opera, and popular fiction. It is not the *Social Contract* but *La Nouvelle Héloïse* which was flying off the press in his own time.

My aim is not to settle Rousseau's views on censorship. The *Republic*'s influence is certainly recognizable, p. 453 yet so is *Crito*'s. *Crito*, again, probes legitimacy as distinct from ↳ substantive justice: what circumstances compel obedience assuming a *non*-ideal legal order? In early European modernity that question takes center stage. After the Protestant Reformation, and with the emergence of nation states encompassing populations in the millions, a unifying theology of justice becomes hard to assume. Hobbes, Spinoza, and Locke adopt contractarian, "rules of the game" models, aimed at justifying obedience to a system that might admittedly fail to optimize substantive justice, or even agreement on what it would mean in principle.

Those writers each envisage opportunities for citizens to be heard. Like *Crito*, however, Rousseau's *Social Contract* posits such opportunities as a condition for political legitimacy. Rousseau opens the *Social Contract* identifying not substantive justice but constitutional legitimacy as the leading question[50]: "Let us agree … that one is obliged to obey only legitimate powers."[51] Montesquieu had adopted a pluralist view, holding that different constitutions suit different peoples at different times. Similarly, Grotius rejected the view that monarchy necessarily presupposes coercive rule, arguing that a people could desire a monarchy as well as a republic. Rousseau turns those views on their head: "A people, says Grotius, can give itself over to a king. According to Grotius a people is therefore a people before giving itself over to a king."[52]

Rousseau would invite trouble by construing that collective desire is a "General Will," sparking accusations that he peddles dictatorship in the guise of democracy.[53] In fairness, his extrapolation from public deliberation to a General Will is forgivable at the time. With medieval warlordism followed by the St. Bartholomew's Night massacre, the Thirty Years War, or the English Civil War, disunity and factionalism are feared in early modernity. Constitutionalists gaze back upon the Roman empire to conclude that some sort of decidedly monarchical peacekeeping structure becomes imperative. Rousseau's "General Will" stands as an admittedly clumsy attempt to maintain that government can be deliberative without falling prey to faction.

The essential point is not, however, that public deliberation follows from the General Will, but that the General Will follows from public deliberation. A people can legitimately adopt a king as "a civil act, presupposing *public deliberation*,"[54] insofar as it can abolish him—any such monarchy being by definition constitutional, not absolute—by another such act. It is public deliberation that remains foundational. Communication and deliberation spring from every page of Rousseau, even his seemingly unpolitical writings; beyond the *Social Contract*, by contrast, the General Will plays no major role in the corpus at all. It is the opportunity for citizen participation through the deliberative process, public discourse, that legitimates the regime.

24.7 Delineating Public Discourse

What counts as "public discourse"? The much vaunted "free speech absolutism" is a legal nonsense. If free speech were absolute, unlimited in its permitted manifestations, one could murder and maim with impunity, one could violate any legal norm at all, claiming at each turn to do so in order to send some message. The law could not respond that those are not, or not primarily, speech acts, since any such definition would already signify a limit and therefore a *non*-absolute freedom. Any absolute freedom of action would always overturn any legal regime (even if all other rules were voluntarily obeyed—arguably rendering the system *as law* a nonsense—since they *could* always lawfully be disregarded).[55] Bans on commercial fraud, false advertising, perjury, and many other regulations are ubiquitous and scarcely challenged. Those laws bar certain speech from public discourse, seemingly belying *Crito*'s promise that law commands our obedience in view of our opportunities to speak. How are we to proceed, then, from *Crito*'s precept to a politically legitimate free speech regime?

Mill's *On Liberty* remains a standard-bearer for free expression—which it certainly is for liberalism, but not, as I shall now argue as the final piece of our puzzle, for democracy, where, ironically, it is the great censors Plato and Rousseau who point toward firmer foundations. Eschewing the absurdities of absolute freedom, Mill's "harm principle" instead proposes a theory of *maximum* freedom, and in that sense a principle of classical liberalism: "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[56] Although Mill adduces positive arguments for free speech, beyond supporting it simply where it causes no harm, the harm principle is all the book offers by way of a limiting principle for free speech.

Far from resolving the problem of legitimate limits, however, the harm principle merely rephrases it. An effective definition for an open-ended concept like “freedom” can succeed only via recourse to more precise concepts. In a milieu dominated by empiricism, Mill, although certainly aware of the variety of harms, assumes “harm” to be more concrete than “freedom.” In our own day, by contrast, following linguistic and hermeneutic “turns” and greater skepticism toward scientific positivism, the two terms seem equally, indeed mutually, indeterminate. Many “liberals” in the post-World War II, Anglo-American sense of progressive state interventionism include general perpetuation of racist, sexist, or other such discriminatory attitudes as harms. By contrast, liberals in the classical, nowadays more continental sense—sometimes loosely called libertarians in the English-speaking world—would deem the harm principle vacuous when “harm” can be so broadly construed.

p. 455 Contemporary democracies conventionally resolve such standoffs through what we can call a “procedural harm principle.” They first assume a harm principle as a sheer formalism, stipulating in the abstract that they shall limit any given freedom insofar as it causes harm. They then consign the task of determining “harm” to constitutionally authorized decision-makers, such as legislators and judges. That process generates conventional rights jurisprudence—the weighing and balancing of rights against limits.[57] For Ronald Dworkin, those balancing processes, at least at the adjudicative stage, cannot be open-ended.[58] Interests can be “taken seriously” as rights only when they carry particular weight, barring the state, for example, from concocting harms at leisure as a means of social control. Even assuming Dworkin’s weighting of rights, however, the problem is that there is nothing democratic about balancing processes per se. Non-democracies too must balance between freedoms and their limits—again, as a condition for the very possibility of a legal system. Balancing processes do not in themselves constitute a regime; they already presuppose one.

Like Robert Post,[59] Dworkin stresses the necessity of free speech for democratic legitimacy.[60] Both authors’ specific legal recommendations are directed not, however, at positive legal *norms* governing the foundation of democracy—not at norms governing the very possibility of constituting a democratic constitution; rather, they recommend only that we add greater weight to free speech within the balancing processes of already constituted regimes. Post indeed observes that he is theorizing only US law, agnostic about other democracies, that is, about democratic legitimacy per se as a distinct question beyond the confines of this or that particular democracy.[61] (Dworkin drops a similar, albeit more cryptic caveat.[62]) Jürgen Habermas theorizes more extensively democracy’s discursive foundations,[63] yet he too translates those foundations not as *legally* foundational but also solely as rights to be accorded weight within established balancing regimes. For all three writers, unjustified censorship amounts to illegitimacy *within* the balancing process, but not to illegitimacy *of* that process.

Liberal rights fail, in a word, to furnish democratic foundations. The liberal question, the question of *On Liberty* and *Taking Rights Seriously*, is: “What factors ought to enter legislative and judicial balancing processes, and with what weight?” The democratic question, the question for *Crito* and the *Social Contract*, is
p. 456 “What constitutes those ↳ processes as politically legitimate before they even begin?” Dworkin, Post, and Habermas correctly perceive the latter question but respond only in terms of the former, in terms of finding the correct weight to be added to the liberal right of free speech within already constituted legislative and judicial processes. All three grasp public deliberation as one step toward answering the second question, but then we face head-on the task of determining what public deliberation is and what limits it entails.

One important step taken within US First Amendment jurisprudence is to distinguish between the “content” and the “viewpoint” of speech. For example, the content of speech about abortion refers to the sheer raising of the issue, irrespective of any particular position taken. “Viewpoint,” by contrast, refers to a position taken.[64] Some content, such as commercial fraud or indeed committing murder to convey a message, may legitimately be restricted irrespective of the viewpoint, if any, that the author seeks to convey. By contrast, once a particular content *is* admitted, such as a discussion of abortion, then the First

Amendment forbids the government from censorship on grounds of the viewpoint taken. Nor may the government legitimately masquerade a viewpoint-based motive as content-based, for example, by abolishing all talk of abortion as a means of silencing pro-abortion advocacy (borderline vagaries are inevitable, but the principle is straightforward in a substantial bulk of cases). A content-based restriction must demonstrate some harm independent of that caused solely by the recitation of a government-disapproved viewpoint.

That principle can be construed as absolute: the absolutism which validates a democracy is not "free speech absolutism" but "viewpoint absolutism."[65] Security rationales may at times be invoked to impose viewpoint-selective censorship, and those rationales can themselves be shams. But those are disputes of a different order. All states claim rights of self-defense and associated security interests; those interests are not distinctive of democracy, and their plausibility entails distinct sets of criteria and verification (levels of security threat, types of dangers posed, proportionality of response, etc.). Viewpoint-selective censorship can be legitimate *only* as a security interest, a stance I maintain contrary to widespread views[66] that viewpoint-based censorship at times positively serves democratic interests. Viewpoint-selective penalties *may* at times serve legitimate security interests, then, no more or less than spying and wire-tapping, *but they never serve democratic interests*. Athens may at best have invoked security rationales to silence Socrates, or might have legitimately silenced him on content-based grounds to prevent harms unrelated to the expression of viewpoint, but cannot legitimately invoke any democratic rationale to silence him solely on grounds of his dangerous viewpoint. *Crito* posits as democracy's foundation not free speech absolutism in all times and places but viewpoint absolutism within the public sphere. A solely freedom-maximizing, classical liberalism p. 457 ↳ must admit even the citizen's freedom, for example, to target a specific individual on the street or in a bar for racial abuse ("fighting words"[67]). *Crito*'s "persuade or obey," by contrast, entails no such license. It admittedly includes provocative and offensive speech, but only insofar as generally directed within public discourse.[68]

Such a principle might admittedly be called "non-liberal" as opposed to the "anti-liberal" of this chapter's title, since there are inevitable overlaps between classically liberal theories of free speech and the democratic one I propose here. My aim is not to kill off liberalism entirely—no more than many non-liberal theories can seriously do so, however much they may claim to do so—but rather to re-align its relationship to democracy. We can reconfigure the relationship between the foundational and the derivative within liberal democracy by rendering "democracy" rather than "liberal" the ultimate value. By identifying the democratic constitution's necessary foundations in public discourse, we make democracy rather than liberalism the *Urverfassung*, the original basis of any particular democratic constitution, that is, the constitution of any democratic constitution. Instead of principles of democracy being purely derivative of and therefore dependent upon the liberal constitution, it is liberal principles that end up purely derivative and dependent upon a full-fledged democratic constitution. At the same time, we avoid the common mistake of deeming the terms "liberal" and "democratic" to be straightforwardly synonymous or interchangeable.

A seeming oddity, however, is that virtually no democracies would count as viewpoint-absolutist, and therefore as legitimate, *except* the USA, which can scarcely been seen as an ideal democracy.[69] Legitimacy assessments are not, however, all-or-nothing. States well rated on democratic indicators, such as Norway or Iceland, do indeed maintain viewpoint-selective regulations, notably hate speech bans, yet their viewpoint-selective censorship reaches little further. On countless issues, including all-important citizens' abilities to criticize state policy and conduct, public discourse remains unhindered with regard to viewpoint, leaving such states with high marks on democratic measures. In the USA, by contrast, viewpoint-selective endangerment of free speech outside the sphere of formal Supreme Court doctrine has raised substantial legitimacy concerns.[70]

Yet are all democracies, beyond the top performers, therefore shams? Not necessarily. Regimes in troubled circumstances, as witnessed through conflicts in Northern Ireland, India, or Israel, again, adduce broader security rationales for more heavily regulating viewpoint-sensitive expression, such as hate speech, but p. 458 again with the caveat that such regulation claims *only* a security rationale, and not any distinctly ↳ democratic justification.[71] I have elsewhere proposed the concept of the "long-standing, stable, and prosperous" democracy (LSPD), examining each of those adjectives to distinguish states that generally can be held to their legitimating conditions from those that may not yet command any such general expectation.[72]

Advocates of hate speech bans commonly point to democracies in which extreme speech led to atrocities, such as the Weimar Republic, Rwanda, or the former Yugoslav states.[73] One role of the LSPD model is therefore to question an inductive fallacy, whereby clear causation between speech acts and mass violence in some democracies is taken to imply the risk of such causation within *any* democracy. What distinguishes the LSPD is a dramatically different sociological make-up. Those democracies such as the Weimar Republic were neither long-standing, nor stable, nor prosperous. Crucial to the atrocities committed was not speech acts per se but rather ease of mobilization among populations lacking any traditions of enculturation or education into specifically democratic values, at least as those are understood today.[74]

24.8 Square One: The Framework of Law and Humanities

But, recalling again Plato's concerns in *Gorgias*, have LSPDs rendered extreme speech altogether harmless? A response to that question prompts us to inquire more broadly into the present context of "law and humanities." Law and humanities scholarship has formed important links with critical theory, appealing to the humanities not to rubber-stamp prevailing legal principles and methods but to explore law's limits and defects. Some readers might have turned to the present chapter seeking the opposite of what I have delivered. Given that the dominant values of Western liberal democracy favor individual freedoms, one might have expected from this chapter a more penetrating critique of how liberal democracy, while claiming to welcome diversity, operates instead to repress, exclude, and marginalize disempowered voices.

One exponent of that critical approach is Rae Langton, who draws upon contemporary speech act and linguistic performativity theory to challenge classical, "Cartesian" models, which would confine expression, including hateful expression, to the sphere of pure ideas. Langton examines illocutionary and perlocutionary operations of language to argue that hateful expression does not merely "denote" a dislike p. 459 but rather actively constructs the social subordination of denigrated groups.[75] Values of free speech, ↳ according that view, may well appeal to purely formal equality before the law to suggest an even playing field for all citizens, but in practice it operates to entrench attitudes favorable to dominant groups and detrimental to those socially marginalized.

The problem with that approach is not that it is wrong but that it is, so to speak, too right by half. It is descriptively persuasive but leaves unclear what prescriptive conclusions, as legal rules, would follow. First, most social problems exists as such insofar as voiceless groups end up disproportionately harmed. Global warming, for example, while superficially appearing to affect all humanity, in fact threatens greatest harm to the poorest. Similar observations can be made about major problems in water and food supply, education, healthcare, elder care, child care, armed conflict, and countless other problems, for which activists aim to agitate in the interests of the disempowered. Yet even good-faith challenges to those activists and can be deemed to entrench, and therefore actively to construct, social subordination.

To restrict all speech favorable to a powerful interest would keep the censors busy indeed, certainly augmenting *their* political power. Alternatively, once we pick and choose among the disempowered only those who most deserve protection, then speech bans, far from overcoming discrimination, perpetuate it by dividing the disempowered into the protected versus unprotected castes. We sail between the Scylla of using law to protect all disempowered groups even-handedly through a comprehensively censorious regime, and the Charybdis of perpetuating discrimination by deeming only some such targets worthy of protection.[76] Nor does speech act theory limit the effects of linguistic performativity to the crudest utterances; to the contrary, it is the temperate and articulate arguments against the interests of the powerless, particularly in corridors of power, that often carry the decisive weight.[77]

Second, nothing about speech act theory confines it to conventionally discriminatory expression. Much artistic expression, for example, glorifies violence. As semiotically performative, such works do not just dispassionately record or comment upon the world but actively construct violence, sailing us between that same Scylla and Charybdis. Third, no principle inherent to speech act theory confines it to progressive politics. It certainly is plausible to assert, for example, that homophobic or transphobic speech socially constructs non-heteronormative dispositions or conduct as pathological. But must we then equally credit countless homophobes and transphobes who claim that open displays of pro-LGBT politics or preferences, too, do not confine themselves to a purely Cartesian, ideational realm but also act in the world to “shove the gay agenda down their throats”? To take speech act theory into account only when it advances one’s own preferred politics is to legislate that politics *irrespective* of speech act theory, rendering it superfluous.[78]

p. 460 In *Crito*, Socrates insists on the duty to face his death sentence not because it is just but even insofar as it is unjust. By contrast, once we construe his radical dialectic not merely as inquiry but as performativity, then he has not simply questioned Athenian democracy but has performatively undertaken its dismantling, rendering him indeed a full-blown security threat. Suddenly Socrates becomes guilty not merely of blasphemy but of treason. Once we legislate speech act theory, Socrates ends up altogether *deserving* a harsh sentence.

Performativity theory is the sociologist’s trusty ally. However, once it also becomes the lawmaker’s tool, acts of speech become crimes of thought with no logical stopping point. Innumerable are the ways in which provocative speech can be said to perform and thereby to construct its own harm, again returning us to the question of defining harm. The problem lies not with the “is” presented by Langton’s performativity thesis, which is sound, but rather with any punitive “should” that might follow in law. By extension, it is certainly important for the law and humanities movement, as for critical theory generally, to explain defects within liberal-democratic paradigms. Whether some seemingly opposite, anti-liberal or anti-democratic norm follows, however, must be demonstrated, and not merely assumed as self-evident, lest it create as much or more illegitimacy in law as it purports to resolve.

We are not, however, left unarmed against intolerance. Another misunderstanding around liberalism is the assumption that the state must remain value neutral.[79] But that assumption is absurd. Everything non-trivially said and done by any state inherently confirms certain values. Moreover, the problems of democratic legitimacy raised by viewpoint-selective speech bans do not leave the state bereft of alternatives. Democracies rely on empowered citizens, and policies promoting civic equality and combatting discrimination in education, the workplace, the marketplace, and the civic sphere powerfully enhance that effort, as long as citizens are not penalized for voicing contrary values, however uncivil those may be. For all Plato’s complaints about Athens, intolerance scarcely counts among them; if anything, like many a reactionary today, he grumbles about too much tolerance, not too little. If Plato’s reasons for distrusting tolerance are precisely our own reasons for embracing it, then we can surely take the same view toward his rejections of democracy and free expression.

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Notes

1 Thucydides, *The Peloponnesian War* 2:37, trans. T. E. Wick (New York: Modern Library, 1982), 108. Commonly believed to be Thucydides’s reconstruction rather than a transcript, Pericles’s oration has nevertheless long been thought to capture a characteristic Athenian democratic attitude.

2 J. S. Mill, *On Liberty and Other Essays*, ed. J. Gray (Oxford: Oxford University Press, 1991), 14.

3 *Peloponnesian War* 2:37.

4 *Republic* 8:557b. Stephanus citations refer to *Plato: Complete Works*, ed. J. M. Cooper (Indianapolis, IN: Hackett, 1997).

5 *Republic* 8:561c–d (emphasis added). Although the present chapter focuses on democratic legitimacy, processes of consultation within non-democracies are equally considered by some writers to be germane to legal legitimacy. See, e.g., John P. McCormick's chapter, "Machiavelli's Camillus and the Tension Between Leadership and Democracy".

6 Alexis de Tocqueville, *De la démocratie en Amérique*, vol. 1, ed. F. Furet (Paris: Flammarion, 1999), pt. 2, ch. 7.

7 Mill, *On Liberty*, 8.

8 *Peloponnesian War* 2:37, 108.

9 Cf. John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), 52.

10 Eric Heinze, *Hate Speech and Democratic Citizenship* (Oxford: Oxford University Press, 2016), 101.

11 See, e.g., *Extreme Speech and Democracy*, ed. Ivan Hare and James Weinstein (Oxford: Oxford University Press, 2009); *The Content and Context of Hate Speech*, ed. Michael Herz and Peter Molnar (Cambridge: Cambridge University Press, 2012).

12 See, e.g., Alexander Tsesis, *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements*. (New York: New York University Press, 2002).

13 See, e.g., Markus Thiel, ed., *Wehrhafte Demokratie: Beiträge über die Regelungen zum Schutze der freiheitlichen demokratischen Grundordnung* (Tübingen, Germany: Mohr Siebeck, 2003); *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, ed. Mari J. Matsuda et al. (Boulder, CO: Westview Press, 1993).

14 Karl Popper, "Vorwort zur siebenten deutschen Auflage 1992," in Karl Popper, *Die offene Gesellschaft und ihre Feinde*, 8th ed., ed. Hubert Kiesewetter (Tübingen, Germany: Mohr Siebeck, 2003), ix.

15 Bertrand Russell, *History of Western Philosophy*, 2nd ed. (London: Routledge, 2000), 123.

16 *Apology* 32c.

17 Thomas C. Brickhouse and Nicholas D. Smith, *Plato and the Trial of Socrates* (London: Routledge, 2004), 91–97.

18 *Apology* 24b.

19 Cf. *Crito* 52a.

20 *Crito* 50d–51a

21 *Crito* 51b.

22 See, e.g., J. M. Kelly, *A Short History of Western Legal Theory* (Oxford: Oxford University Press, 1992), 16.

23 Heinze, *Hate Speech*, 5, 45, 46, 50, 55–57.

24 Jürgen Habermas, *Faktizität und Geltung* (Frankfurt, Germany: Suhrkamp, 1998).

25 Jürgen Habermas, *Theorie des kommunikativen Handelns*, 8th ed., Vols. 1 & 2 (Frankfurt a.M., Germany: Suhrkamp, 1981).

26 See de Tocqueville, *De la démocratie*, vol. 1, 355.

27 Cf. Heinze, *Hate Speech*, 6, 82, 90. Cf. also Eric Heinze, "The Constitution of the Constitution: Democratic Legitimacy and Public Discourse," in *Rancière and the Possibility of Law*, ed Mónica López Lerma and Julen Extabe (Abingdon, U.K.: Routledge, 2018), 111–128, 123, 124.

28 See, e.g., UN Human Rights Council, *Report on Human Rights in the Democratic People's Republic of Korea*, U.N. Doc. A/HRC/25/CRP.1 (2014).

29 *Apology* 17c–17d; cf. 31d–32c.

30 See above, text accompanying notes 6–7. For delineations of the public sphere and access to it, see, e.g., works cited above, notes 24–25.

31 See, e.g., Drucilla Cornell, Michel Rosenfeld, and David Gray Carlson, eds., *Deconstruction and the Possibility of Justice* (London: Routledge, 1992); Alan Norrie, ed., *Closure or Critique* (Edinburgh, Scotland: Edinburgh University Press, 1993).

32 See, e.g., Economist Intelligence Unit, *Democracy Index 2017* (London: The Economist, 2018).

33 For a view on equalizing access without penalizing provocative speakers, see the discussion of "active democracy" in Heinze, *Hate Speech*, 111–116.

34 *Politics* 1252^{a}15–16; 1277^{a}25–26; 1277^{b}7–16. Bekker citations refer to Jonathan Barnes, ed., *The Complete Works of Aristotle* (Princeton, NJ: Princeton University Press, 1984).

35 *Nicomachean Ethics* 1155^{a}24–29; *Politics* 1262^{b}6–10.

36 *Rhetoric* 1355^{a}29–31.

37 *Rhetoric* 1355^{a}33–34.

38 *Politics* 1326 ^{a}5–27 ^{a}2.

39 *Politics* 1307^{b}32–33.

40 See, e.g., Eric Heinze, "*Where be his quiddities now?*: Law and Language in *Hamlet*," *in Law and Language: Current Legal Issues*, vol. 15, ed. Michael Freeman and Fiona Smith (Oxford: Oxford University Press, 2013), 201–220, 203–208.

41 *Hamlet* 3.1.54 and 3.4.7 (stage directions). Lineations refer to *The Norton Shakespeare*, 3rd ed., ed. S. Greenblatt et al. (New York: Norton, 2015).

42 *Richard II*, 5.2.71–72; *Henry VIII*, 3.2.313–316; ironically, *King Lear* 1.2.29–57.

43 *Othello* 1.1.66; 3.3.322; *Much Ado About Nothing* 2.2.18, 3.1.86, 5.1.231; *Cymbeline* 1.6.125.

44 *2 Henry 4*, Induction.

45 E.g., *Henry 5*, Prologue, 3.0.

46 Evelyn Beatrice Hall, *The Friends of Voltaire* (London, Smith, Elder, 1906), 199.

47 See, e.g., Russell, *Western Philosophy*, 669.

48 Ian Cram, "Coercing Communities or Promoting Civilised Discourse?," *Human Rights Law Review* 12, no. 3 (2012): 476–477.

49 Ibid., 476.

50 Jean-Jacques Rousseau, *Du Contrat social* 1:1. References are to *Oeuvres Complètes* 3 (Paris: Gallimard Pléiade, 1964).

51 Ibid., 1:3.

52 Ibid., 1:5.

53 See, e.g., Russell, *Western Philosophy*, 669.

54 Ibid., 1:5 (emphasis added).

55 Heinze, *Hate Speech*, 40–41.

56 *On Liberty*, ch. 1. Cf. *Déclaration des droits de l'homme et du citoyen* (1789), art. 4. Cf. also Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969) (construing such principles as hallmarks of "negative" liberty).

57 See, e.g., Robert Alexy, *Theorie der Grundrechte*, 6th ed. (Frankfurt a.M., Germany: Suhrkamp, 1986).

58 Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), 46–80.

59 Robert Post, *Constitutional Domains* (Cambridge, MA: Harvard University Press, 1995).

60 Ronald Dworkin, "Foreword," in *Extreme Speech and Democracy*, ed. Ivan Hare and James Weinstein (Oxford: Oxford University Press, 2009), v – ix; Ronald Dworkin, "Reply to Jeremy Waldron," in *The Content and Context of Hate Speech*, ed. Michael Herz and Peter Molnar (Cambridge: Cambridge University Press, 2012), 341–344. In addition to the element of legitimacy some writers cite "agonism" as germane to democratic procsses. Cf., e.g., Panu Minkkinen's chapter, "Agonism, Democracy, and Law, in this volume.

61 Peter Molnar, "Interview with Robert Post," in *The Content and Context of Hate Speech*, ed. Michael Herz and Peter Molnar (Cambridge: Cambridge University Press, 2012), 11–36, 25.

62 Discussed in Heinze, *Hate Speech*, 12.

63 See above text accompanying notes 24–25.

64 James Weinstein, *Hate Speech, Pornography, and the Radical Attack on Free Speech Doctrine* (Boulder, CO: Westview Press, 1999), 82–83 (discussing Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 829 (1995)), 86–87, 91.

65 Heinze, *Hate Speech*, 77, 81, 82, 95, 102, 114, 149, 190.

66 See, e.g., Gündüz v. Turkey, Eur. Ct. H.R., no. 35071/97, judgment of December 4, 2003, ¶40; cf. Erbakan v. Turkey, Eur. Ct. H.R., no. 59405/00, judgment of July 6, 2006, ¶56.

67 Cf. Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).

68 On the forms and scope of public discourse, cf. Heinze, *Hate Speech*, 26–30.

69 The United States perennially fails to rank even among the top twenty states on democratic indicators as assessed annually by the Economist Intelligence Unit (EIU). See, e.g., EIU, *Democracy index 2016* (London: The Economist, 2017).

70 See, e.g., Reporters without Borders, "United States" in 2017 *World Press Freedom Index*, https://rsf.org/en/united-states, accessed Feb 15, 2018.

71 Heinze, *Hate Speech*, 78–79, 130.

72 Ibid., 69–78.

73 See generally, e.g., Alexander Tsesis, *Destructive Messages*.

74 Ulrich Preuß, "Die empfindsame Demokratie," in *Verbot der NPD oder mit Rechtsradikalen leben?* (Frankfurt, Germany: Suhrkamp, 2002) 104–119, 115. For further discussion of mobilization, as opposed to hate speech in itself, as decisive for mass harmful effects, see Heinze, *Hate Speech*, 129–137.

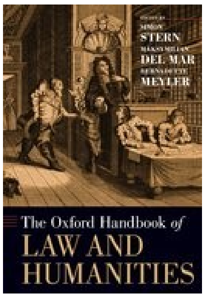
75 Rae Langton, "Speech Acts and Unspeakable Acts," *Philosophy and Public Affairs* 22 (1993): 305–330.

76 Cf. Eric Heinze, "Cumulative Jurisprudence and Hate Speech: Sexual Orientation and Analogies to Disability, Age and Obesity," in *Extreme Speech and Democracy*, ed. Ivan Hare and James Weinstein (Oxford: Oxford University Press, 2009), 264–284.

77 Cf. Heinze, *Hate Speech*, 150.

78 Cf. Eric Heinze, "Democracy, Ontology, and the Limits of Deconstruction," in *Hate, Politics and Law*, ed. Thomas Brudholm & Birgitte Johanssen (London: Oxford University Press, 2018), 94–112.

79 See, e.g., Jeremy Waldron, *The Harm in Hate Speech* (Boston: Harvard University Press, 2012), 3.



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CHAPTER

25 Family Law

Khiara M. Bridges

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Abstract

This chapter examines the dual system of family law in the USA. It observes that the USA has a set of laws that regulates more affluent families and an entirely distinct set of laws that regulates poor families. Moreover, the family law for the poor is uniquely punitive. The chapter offers that the dual system of family law, and the brutal nature of family law for the poor, can be explained in terms of the moral construction of poverty—the idea that poverty is a result of an individual's shortcomings. The chapter proposes that the moral construction of poverty offers a unique framework through which to view and critique the family law for the poor. It demonstrates the utility of the framework through an analysis of the Court's 1970 decision in *Dandridge v. Williams*, upholding the constitutionality of family cap policies that restrict the size of the grants that welfare beneficiaries receive to support their families.

Keywords: welfare, poverty, moral construction of poverty, dual system of family law, TANF, race, public benefits, discourse, family caps, child exclusion policies

Subject: Family Law, Jurisprudence and Philosophy of Law, Law and Society, Law

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WHAT exactly is family law? If you look at most family law casebooks in the USA, you will likely get the sense that the rules governing marriage, divorce, and child custody are, in the aggregate, family law. Indeed, most family law courses spend the bulk of the semester exploring issues around who can get married and under what circumstances, the distinction between divorce and annulment, assessments of alimony and the division of the marital estate, the enforceability of antenuptial agreements, child custody and the apportionment of parenting time, and, if time permits, adoption.

However, the laws that regulate marriage, divorce, and child custody are not the only laws that regulate family lives and relationships. Laws that empower state actors to investigate allegations of child abuse and neglect, statutes that allow for the termination of parental rights when a mother or father is incarcerated or deemed incapable of parenting competently, zoning laws that prevent certain types of families from cohabiting in a single household, regulations that govern the size of public assistance grants for eligible families, policies that prevent the expenditure of government dollars on abortion services—all of these laws undoubtedly regulate families, affecting their size, their contours, and the behavior of their members vis-à-vis one another. This set of laws, however, is almost the exclusive province of the indigent.

The body of laws that most family law courses analyze and to which the term "family law" traditionally refers tends to be mostly relevant to the middle class.[1] In fact, if an individual enjoys some degree of class privilege, she likely will never encounter any of the laws that regulate the families of the poor. She likely will not be investigated by child p. 466 ↳ protective services or have her child removed from her home and placed in foster care.[2] She likely will not be told that her family is not a "family" within the definitions provided in the zoning law and, as a consequence, told to move out of her residence.[3] She likely will never confront policies that attempt to manage her fertility by managing the size of her government aid grant.[4] At the same time that wealthier people remain effectively immunized from the family law that indigent people encounter, poor people—especially poor people of color—remain unmarried at rates that dwarf their counterparts with class privilege.[5] Thus, the poor frequently do not have the occasion to come into contact with the laws around marriage and divorce that structure the families of those with class privilege.

What is more is that the family law that largely concerns the poor treats the families under its jurisdictions quite differently from the family law that largely concerns those who are not poor. Although Jacobus tenBroek endeavored to analyze California's dual system of family law specifically, his summary of what he discovered in the state accurately describes the nation's dual system as a whole. Indeed, generally speaking, the system of family law for the poor and the system of family law for the wealthy

> are different in origin, different in history, different in substantive provisions, different in administration, different in orientation and outlook. One is public, the other private. One deals with expenditure and conservation of public funds and is heavily political and measurably penal. The other deals with the distribution of family funds, focuses on the rights and responsibilities of family members, and is civil, nonpolitical, and less penal. One is for underprivileged and deprived families; the other for the more comfortable and fortunate.[6]

As tenBroek indicates, the family law for those with class privilege is significantly less punitive than that which is reserved for the poor. This is not to deny that wealthier individuals who experience the coercive effects of the family law for the class privileged—for example, an individual who is forced to pay large sums of alimony to a former spouse, or a parent who is forced to share legal or physical custody of his children when he desires sole custody—may feel "punished" by the judgments meted out to him. However, few would describe the system as a whole as penal in design or in effect. The same cannot be said for the family law of the poor.

p. 467 Consider *Moore v. City of East Cleveland*, in which the Supreme Court struck down a zoning law that prohibited families that defied middle-class norms from living under the same roof.[7] Inez Moore, who was the named plaintiff in the case, was a grandmother who lived with her son, her son's son, and another son's son. She brought suit against the state when she was charged with a crime because her family was not a "family" within the terms of the zoning law. The zoning law provided that while she could live with her son and her son's son, she could not live with her son and two grandchildren who did not share the same parents.[8]

The ordinance at issue in *Moore*, with its explicit declaration of what is and is not a "family," clearly regulates families. Indeed, it defines what a family is and subjects to criminal prosecution those collections of individuals who insist upon cohabiting despite their failure to come within statutory definitions. Further, the ordinance at issue in *Moore* clearly regulates the *poor* family while leaving undisturbed families with class privilege. As explained in Justice Brennan's concurring opinion, it is the poor who, due to economic necessity, find themselves sharing households with non-nuclear family members. He states that "[i]n today's America, the 'nuclear family' is the pattern so often found in much of white suburbia. … The 'extended family' that provided generations of early Americans with social services and economic and emotional support in times of hardship … remains not merely still a pervasive living pattern, but, under the goad of brutal economic necessity, a prominent pattern—virtually a means of survival—for large numbers of the poor and deprived minorities of our society. For them, compelled pooling of scant resources requires compelled sharing of a household."[9]

While the Court ultimately struck down the ordinance, we ought to take note of the *harsh* nature of the law—a law that four Justices would have upheld. Kerry Abrams writes that the ordinance at issue in the case shows that regulation of poor families "can take extremely punitive forms, criminalizing a family's decision to do something as simple as living together."[10] When the composition of Inez Moore's household was discovered, she was told that she had to move one of her grandchildren—the one who was not residing with his father—out of the home.[11] Moore's brief to the court revealed that this child had come to live with her because his mother had died before his first birthday; Moore had moved this little boy into her home because she wanted to provide him with "a substitute for his mother's care and to establish a more normal home environment."[12] The ordinance would have thrust him, an orphan, into another person's home without regard to any attachment he may have felt toward his grandmother, uncle, and cousin. Indeed, the ordinance would have forced him out of his grandmother's home without regard to whether there was another home that would be available to him. The *brutality* of such a law—a law to which only the poor would have found themselves subjected—should not be overlooked.

p. 468 Having observed the reality of a dual system of family law, we might ask what an attentiveness to the social and political context of this dual system might bring to the study of the subject. What might this context reveal? As it happens, paying attention to the sociopolitical milieu that is both the cause and the effect of the dual system of family law might allow us to discover why it exists in the first instance. That is, an awareness of the social world upon which the law acts and that acts upon the law—and an ethical commitment to a society in which pernicious inequalities have been eliminated—encourages us to go beyond simply noting the existence of separate systems of family law for the poor and the wealthier. This critical attitude incites us to interrogate why the nation has erected, and perpetuated, a dual system of family law. And it urges us to understand precisely why the system reserved for the poor is as brutal as it is.

To help us interrogate the "why" behind the dual system of family law, we might engage in a bit of Foucauldian discourse analysis and investigate "what is said" about the poor in order to understand how they are comprehended in society and, relatedly, why society treats them the way that it does.[13] If we engage in this analysis—excavating the narratives, stories, and tales that circulate in society about the poor—we will very likely stumble upon the *moral construction of poverty*.[14]

The moral construction of poverty is the simple idea that people are poor because there is something wrong with them. This discourse about poverty denies that people find themselves impoverished because of forces largely outside their control. It denies that poverty might be explained by large-scale, macro-processes. It proclaims instead that the causes of poverty are located squarely within the individual. The moral construction of poverty contends that people are poor because they are lazy, they are averse to work, they are unable to delay gratification, they would prefer to engage in crime rather earn an honest living, they feel entitled to government handouts, and so on. The moral construction of poverty declares that poverty is evidence of a moral failing. To be poor is a moral status. And, of course, if people are poor because of their own behavioral or ethical deficiencies, then we are justified in ridiculing them, castigating them, and *punishing* them for their poverty.

The moral construction of poverty, which is a decidedly individualist explanation of poverty, sits in direct opposition to structuralist explanations of the same. The latter locates the causes of poverty in myriad institutional processes well outside the individual, including the polarization of the economy such that it no longer contains as many middle-skill jobs that pay a wage substantial enough to support a family[15]; the nation's choice to fund public schools through property taxes, with the result being that children living in poor neighborhoods are compelled to attend underfunded schools that lack ↳ p. 469 the financial wherewithal to offer decent educations[16]; the nation's choice to pursue mass incarceration, an undeniably impoverishing mechanism,[17] as the means with which it will address its social problems; and our immigration laws, which make it extremely difficult for migrants from Mexico and Central America to immigrate to the country legally and which, as a consequence, produce a population of extremely vulnerable (and exploitable) laborers.[18] The moral construction of poverty rejects these alternative, structural explanations of poverty—structural explanations, we should note, that would free those who find themselves impoverished from moral blame for their economic status. Instead, the moral construction of poverty places responsibility for indigence in the hands (and hearts and minds) of those suffering the weight of that indigence, allowing those of us who are not poor to wag our fingers at them and say, "For shame."

We should note how the moral construction of poverty justifies the highly regulatory approach that the family law of the poor takes toward those within its jurisdiction. If people are poor because there is something wrong with them—because they are *deviant* in important respects—then poor parents *ought* to be closely monitored and supervised, as their flaws necessarily implicate their dependent charges, who may need to be protected from their parents' flaws. We should note as well how the moral construction of poverty justifies the fairly non-obtrusive approach taken by the family law reserved for those who are not poor. The moral construction of poverty presupposes the moral construction of *wealth*—the idea that people are *not* poor because there is something *right* with them. As such, the family law for those who are not poor—for people who are *not* deviant—does not proceed from a baseline of intervention into the families within its jurisdiction. It proceeds with an understanding that the law ought not to get involved in these families—an understanding that we can and ought to trust the decisions and judgments that the heads of wealthier families make vis-à-vis one another and vis-à-vis their children. The family law for the wealthy does not regulate the family unless and until the family asks the law to do so—when there is a dissolution of a marriage or when an individual endeavors to adopt a child, for example. This, of course, is diametrically opposed to the family law of the poor, for which intervention, surveillance, regulation, and punishment appear to be its guiding principles.

What cultural texts evidence the moral construction of poverty? In truth, there are many. One of the most brazen, however, is the Temporary Assistance for Needy Families ↳ p. 470 program (TANF).[19] TANF—a law that unambiguously and powerfully affects families but, nonetheless, is not typically taught in traditional family law classes—replaced Aid for Families with Dependent Children (AFDC) as the program that supplies cash assistance to indigent families.[20] TANF represents a punitive turn in the state's approach to assisting the most vulnerable families inasmuch as it contains various provisions that make it extremely difficult for individuals to parent while poor—including lifetime limitations on the length of time an individual can receive TANF benefits, requirements that compel indigent parents who are raising small children to work outside the home, and authorizations for states to spend federal TANF funds on programs that promote marriage among the poor in lieu of spending these funds on grants to indigent families.[21] TANF was instituted by the Personal Responsibility and Work Opportunity Reconciliation Act, an act that wears its commitment to individualist explanations of poverty on its sleeve. Indeed, the title of the act insists upon the *personal responsibility* of those who are its beneficiaries. The assumption appears to be that it is personal *ir*responsibility—behavioral and ethical deficiencies—that have led those who would benefit from the program into the indigence that precipitates their turn to state assistance. The act appears to presuppose that the way out of indigence is individual in nature—through privatizing one's dependence through marriage or through throwing oneself into the low-wage labor market.

Another cultural text that evidences the moral construction of poverty is the Court's jurisprudence concerning the indigent. *Dandridge v. Williams* is illustrative.[22] Although *Dandridge*, like TANF, is not typically taught in most traditional family law courses, it undeniably regulates the family and, consequently, is a species of family law. *Dandridge* concerns a Maryland policy that capped the amount of funds that an indigent family could receive under the state's AFDC program.[23] The state had calculated a "standard of need" for each family that increased with the size of the family, and it provided grants in accordance with the family's needs as determined by the state. However, Maryland had restricted the size of grants at a certain point. The result was that families that consisted of seven or more individuals received grants that did not meet their "standard of need." The question for the Court was whether the funding p. 471 scheme violated the equal protection ↳ rights of individuals who were members of families consisting of seven or more persons. The Court answered this question in the negative.

Now, we do not need to look to cultural texts to analyze *Dandridge*. We might begin this fairly traditional, doctrinal analysis by noting that the Court declined the invitation to use heightened scrutiny to review the law, choosing instead to employ rational basis review—a low level of scrutiny that almost guarantees the constitutionality of the laws under its purview. The Court chose to use rational basis review to evaluate the constitutionality of the Maryland law despite the funding scheme's effect on *families*. At the time of the Court's decision in *Dandridge*, the jurisprudence had well established that laws that intervene into families and attempt to regulate them are appropriately reviewed with strict scrutiny. Indeed, this jurisprudence was a little less than half a century old at the time of *Dandridge*.

In 1923, the Court decided *Meyer v. Nebraska*, in which it struck down a law that prohibited schools from teaching students who had not yet reached the eighth grade any language other than English.[24] A parent who wanted his child to learn German, for example, was unable to facilitate this education under the Nebraska law. In this way, the law thwarted parents' ability to raise their children as they saw fit. Part of the rationale for the Court's decision to strike down the law was its sense that the law interfered with the right of the parent to direct the education of his child. The Court felt that the law at issue in the case infringed upon "the natural duty of the parent to give his children education suitable to their station in life."[25] The Court ruled that absent compelling circumstances, the Constitution did not allow the state to thwart parents' desires with respect to their children.

Meyer was the first in a line of cases that held that courts ought to presume the unconstitutionality of laws that interfere in the family and, consequently, ought to review such laws with the most rigorous scrutiny. Nevertheless, in *Dandridge*, the Court refused to be guided by this line of cases and held instead that the lowest level of review was appropriate. Why? In answering this question, we might do what lawyers and law professors have traditionally done and look to the rationale that the Court expressly articulated in the opinion. The Court stated that the challenged Maryland funding scheme fell within the "social and economic field, not affecting freedoms guaranteed by the Bill of Rights."[26] It argued that to use anything other than rational basis review would be "far too reminiscent of an era when the Court thought that the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought,' " quoting its decision in *Williamson v. Optical Co.*[27] Thus, the Court raised the *Lochner v. New York* boogeyman, a case that marked an era characterized by judicial overreach and understood among most as a lamentable moment in the history of constitutional p. 472 interpretation.[28] During the age of ↳ *Lochner*, the Court read the due process clause as containing a fundamental right to contract, and it struck down regulations that sought to manage the labor market and protect laborers—such as minimum wage and maximum hour laws—as unconstitutional infringements on this fundamental right. In *Dandridge*, the Court argued that the Maryland funding scheme was akin to the minimum wage and maximum hour laws that the Court unjustifiably struck down during the *Lochner* era. In order to prevent an illegitimate return to those days, the *Dandridge* Court claimed that it had to decline to use strict scrutiny when reviewing the Maryland law and, instead, uphold the law if a rational relationship existed between it and a legitimate end that it pursued. We could certainly use the analytical tools that lawyers traditionally have employed to debate the propriety of the analogy between family cap policies and minimum wage or maximum hour laws.

This is not to say that a typical doctrinal analysis does not allow us to be critical of *Dandridge*. We might note that *Dandridge* represents a complete reversal from the path that the Court's poverty law jurisprudence appeared to be taking in the years and months that preceded the decision. Four years prior to *Dandridge*, the Court decided *Harper v. Virginia Board of Elections*, in which it held that a state poll tax was unconstitutional.[29] There, the Court argued, in dictum, that "[l]ines drawn on the basis of wealth or property, like those of race, are traditionally disfavored"[30]—suggesting that strict scrutiny was the appropriate level of review for laws that discriminated against the poor, as the law at issue in *Dandridge* unquestionably did. Three years after *Harper*, and one year before *Dandridge*, the Court decided *McDonald v. Board of Election Commissioners of Chicago*, striking down a law that prevented incarcerated persons who were unable to post bail from voting.[31] There, the Court stated, again in dictum, that "a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny."[32] Of course, if the Court used a more exacting judicial scrutiny on lines drawn on the basis of wealth—that is, laws that disproportionately or unduly burdened the poor—then it would have been more skeptical of the Maryland law at issue in *Dandridge*, insofar as it functioned to devastate the largest, and possibly poorest, indigent families in the state.

Finally, a couple of months before *Dandridge*, the Court decided *Goldberg v. Kelly*, in which it held that public benefits were a species of property and that recipients of such aid were entitled to due process, namely, a fair hearing, before their aid could be terminated.[33] There, the Court, once again in dictum, quoted the Preamble to the Constitution and stated that

> Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate ↳ meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."[34]

Thus, the *Goldberg* Court suggested that the very text of the Constitution contains a positive guarantee of basic subsistence. If true, then a law, like the Maryland funding scheme, which functioned to deny individuals the means by which they could "participate meaningfully in the life of the community," would be scrutinized closely and struck down if overbroad or not closely designed to achieve the ends it is designed to achieve.

So, just months before the Court handed down *Dandridge*, it seemed to be on a crash course toward holding that either the due process clause or the equal protection clause, or both, requires the government to provide the basic means of survival to the indigent and or/refrain from unduly burdening the poor. The Court appeared to be hurtling toward a holding that courts will presume the unconstitutionality of a law like the one at issue in *Dandridge*, which failed in both respects. A traditional doctrinal analysis of *Dandridge* would allow us to observe as much and critique the decision for veering from the result to which the precedents appeared to leading.[35]

However, this traditional doctrinal analysis does not allow us truly to interrogate *why Dandridge* was decided the way that it was. What counseled the Court to veer so dramatically from the path set out by *Harper, McDonald*, and *Goldberg*? What led the Court to view the Maryland funding scheme as more appropriately conceptualized as falling within the "social and economic field" (and, therefore, aptly scrutinized with rational basis review) and less appropriately conceptualized as falling within the field of family law (and, therefore, aptly scrutinized with strict scrutiny)? What enabled the Court to dismiss so easily the rebuke that Justice Marshall articulated in his dissent, in which he reprimanded the majority for raising the specter of *Lochner* when the case did not concern “a gas company or an optical dispenser,” but rather “needy dependent children and families?”[36]

p. 474 An analysis of *Dandridge* that attends to culture—one that is attuned to the sociopolitical context of the case—would lead us to pay attention to the moral construction of poverty and how ideas about the ethical and behavioral deviance of the indigent are embedded in the decision and help to produce the result in the case. Consider in this light the justifications that the state offered for the funding scheme. It argued that capping the size of the grant that families could receive served four purposes: it prevented families receiving public benefits from having higher incomes than families with a wage-earner in the labor market; it distributed the limited resources that Maryland had in such a way that the state could meet more indigent families’ needs; it “encourag[ed] gainful employment”; and it “provid[ed] incentives for family planning.”[37] While all of the claimed purposes of the act might be analyzed in light of cultural discourses—with an eye toward revealing the cultural assumptions that motivate them[38]—the last two purposes are particularly interesting in view of the moral construction of poverty.

First, Maryland contended that denying particularly large families grants that would meet their needs would inspire the heads of households to seek and secure “gainful employment.” In essence, ensuring that large families did not have the means to meet their basic needs would push the heads of indigent households out of the home and into the market for wage labor. We might first observe the work done by the state’s identification of the market for wage labor as the site of “gainful employment.” This identification allows the home to figure as either the site of *ungainful* employment or, more likely, the site where individuals are not employed at all. This representation of the home devalues the labor performed therein—labor that, historically, has been performed by women and is gendered female. It denigrates the work involved in raising children and managing a household. Indeed, the labor involved in cooking, cleaning, and caretaking—labor that people who perform it frequently describe as incessant and overwhelming—is erased as labor.[39]

p. 475 Further, we might pay attention to what Maryland’s funding scheme assumes about the indigent household heads who receive grants under it. It presupposes that they *can* work outside the home; they simply choose not to do so. As such, the funding scheme is imagined to simply incentivize these individuals to get off of the couch and out the door. Of course, this assumption about indigent household heads in Maryland flies in the face of the hard facts of the case, inasmuch as the majority was forced to acknowledge that none of the individuals who challenged the state policy were “employable.”[40]

But, perhaps more importantly, the assumption that the beneficiaries of the Maryland program could work but just elected not to allows us to see that *Lochner* is not the only apparition that haunts the majority opinion in *Dandridge*. Also present in the interstices of the opinion is the phantom of the “welfare queen”—that racialized cultural figure who was popularized by then-President Ronald Reagan in the 1980s in a bid to garner public support for a conservative platform that featured a vast reduction in government spending. As depicted by Reagan, the “welfare queen” was a woman who was able, quite literally, to get fat off of the governmental largesse that the welfare programs instituted by “big government” so indiscriminately gave away to the undeserving poor. As an example of the “welfare queen” whom social welfare programs like AFDC produced and enabled, Reagan told the story of a Chicago woman who had “ ‘80 names, 30 addresses, 12 Social Security cards and tax-free income over $150,000.’ ”[41] This woman, like all the “welfare queens” who she represented, *could* work. She just didn’t. Instead, she elected to sit back, collect her welfare checks, and enjoy a lavish lifestyle at the government’s, and taxpayers’, expense.

Now, one might argue that the “welfare queen” cannot haunt the interstices of *Dandridge* inasmuch as the case was decided in the 1970s, and Reagan did not give birth to the “welfare queen” until the 1980s.

However, this argument misses that Reagan did not create the “welfare queen”; he simply gave a name to a cultural figure that has existed in the discourses of the nation since our earliest historical moments. In historian Mary Farmer-Kaiser’s account of freedwomen’s experiences with the Freedmen’s Bureau, she describes the fears that many observers at the time had that formerly enslaved people—especially women—would attempt to exploit the system by choosing not to work and electing to collect benefits from the Bureau instead. She writes,

> Attributing black inferiority to racial differences or to the experience of slavery, whites, including those employed by the bureau, accepted prevailing stereotypes that characterized African Americans as mentally, physically, and spiritually inferior to whites and, in the words of one bureau official, predisposed to “idleness, vagrancy, pauperism and crime.” Blacks, contemporary anxieties stressed, were naturally dependent, and emancipation only intensified such fears. Poverty too muddied the waters for black women. Contemporary attitudes toward pauperism,
> p. 476 indeed toward ↳ the poor of both races, led bureau officials to conclude that recipients of public charity, whatever their race, would eventually defraud the government in an effort to “claim any good that is gratuitous.”[42]

There was nothing new in Reagan’s description of a woman who was inclined to shirk labor market participation and sit back in her housing project while taxpayers fund her lifestyle—a woman who needed to be encouraged to obtain “gainful employment” through the state’s refusal to open its purse for her. The ghost that haunted Reagan is the same ghost that haunted the observers of the Freedmen’s Bureau. And it is the very same ghost that haunted the family cap policy in *Dandridge*.

What is important to underscore here is the *deviance* that is imagined to attach to the indigent head of household that figure in *Dandridge*. Something is off in her ethical calculus. She does not seek to work as a matter of pride or dignity. Neither is she shamed by her dependence on government assistance and the aid of others. Instead, she must be prodded to support herself.

Maryland’s presumption that the indigent heads of household in the state are employable and might properly be encouraged to seek remunerative labor outside the home incites us to observe the shifting, contingent nature of the idea of employability. In the past, women who were engaged in the oftentimes all-consuming task of raising young children were not thought to be employable. Their responsibility for caring for dependent charges rendered them inappropriate participants in the wage-labor market. The 1935 legislation that gave birth to the modern welfare state included the Aid to Dependent Children (ADC) program, which would eventually become AFDC.[43] At its inception, ADC was intended to provide grants to widows with children. The impulse behind the program was the sense that mothers whose husbands had died and who did not have a source of income should not be forced to leave their children in order to engage in “gainful employment” in the labor market. Indeed, the impulse behind ADC was that *these women were not employable* inasmuch as engaging in wage labor in the labor market required them to leave their children. Because widows with children were figured as properly engaging in the work of raising their offspring, they were constructed as improperly engaging in remunerative labor in the public sphere. Fast-forward three and a half decades, and we find Maryland defending its funding scheme with the claim that it is an effort to spur the heads of indigent households with dependent children to secure “gainful employment.” We bear witness to a complete transformation in ideas of employability. We witness contingency in the concept of employability. We witness how the mothers of young children are rendered as unsuited for the labor market in one historical moment while in another historical moment, they are thought to be suitably coerced into labor market participation.

What changed between 1935 and 1970? Many things. However, one of the most significant changes was the
p. 477 racial composition of the group of mothers who were ↳ thought to benefit from programs that would
support indigent families. In 1935, 85 percent of beneficiaries of ADC/AFDC were white.[44] However, as a

result of litigation that had made welfare an entitlement—thus enabling black women to access the public benefits that white women had enjoyed in prior decades—a preponderance of beneficiaries of AFDC were black by the late 1960s.[45] The demographics of welfare receipt allows us to see how race transformed the meanings of motherhood. When white, a mother is one who ought to raise her children in the home. When black, a mother is one who ought to support her children through wages earned in the labor market. In this way, *Dandridge* allows us to see the *racially inflected nature of employability*.

Let us now turn to the other particularly revealing justification that Maryland offered for its decision to cap benefits for families of seven or more individuals: the state argued that the policy would "provid[e] incentives for family planning."[46] Here, the state appears to assume that families composed of seven or more individuals result from irresponsible procreation. The argument presupposes that at least one of the reasons these families are large is the gradually increasing size of the welfare check that awaits them. The claim is that if the government closes its wallet, then the heads of these households would control their fertility and decide not to bear additional children.

Notably, this justification ignores the possibility that families may be large before the need to turn to public assistance arises. That is, two financially independent individuals heading a household may decide to have five children. However, tragedy may strike after their fifth child has been born: one of the household heads may become ill or disabled, thus compelling the family to turn to government aid for its economic survival. Under circumstances like these, a family cap policy like the one that Maryland instituted would not provide an incentive for family planning. The family would already consist of seven individuals before the household heads became aware of any disincentives to procreate present in the program. What is important to observe here is that if narratives about vulnerability and uncertainty—about the contingency of good fortune and the possibility that it could all be taken away at a moment's notice—were more ubiquitous and had more power in society, they might have challenged the validity of the family cap policy. Instead, commonsense narratives about procreative irresponsibility buoy the legitimacy of the policy.

Also of note is that this justification ignores the possibility that families may become large not as a result of procreation but rather as a consequence of necessity. Consider Inez Moore, who challenged the definition of family present in Cleveland's zoning law. Moore's household consisted of four people not because she was residing with her three children but, rather, because misfortune had made it necessary for her to share a home with her son and two of her grandsons. Further, Moore's family is not at all unique in this respect, as p. 478 Brennan's concurrence makes clear.[47] Poverty and calamity oftentimes ↳ combine to put extended families under one roof. In essence, if ours was a society in which large indigent families were associated with tragedy and economic necessity instead of promiscuity and carelessness, the Court's rationale in *Dandridge* might have looked different. Indeed, the family cap policy at issue in that case might not have existed in the first instance.

Narratives about the precariousness of stability or the role that misfortune plays in producing households do not appear to have informed the funding scheme that was challenged in *Dandridge*. Instead, narratives about the reproductive recklessness of the poor produce the funding scheme as a logical way of dealing with large poor families. The idea that poor women will have an immoderate number of babies even when they are receiving public assistance—indeed, *especially* when they are receiving public assistance—explains the logic motivating the claim that the funding scheme promoted family planning. As subjects who are embedded in our cultural context, we are all aware of the stories about women who have babies for the sole reason of increasing the size of their welfare check. Narratives about the dangerous fertility of the poor exist in our collective commonsense and shape our understandings of what is a social problem and how we ought to address it. These narratives are on full display in the *Dandridge* litigation.

In this way, the argument that the family cap policy would provide incentives for contraceptive usage among the beneficiaries of the program reveals, in all of its insulting glory, that the reproduction of indigent women is conceptualized as *deviant*. Poor women are not imagined to reproduce for all of the worthy and respectable reasons that are believed to incite wealthier women to bear children. They are not thought to reproduce to satisfy some instinctual, presocial urge. They do not reproduce because they love their partners and want to produce a child who, quite literally, is an embodiment of that love. They do not bear children because they want to give another person a chance at a more joyful, less sorrowful life than the ones they have been forced to lead. Instead, according to ubiquitous poverty narratives, poor women have children because they did not have the proper incentives to engage in family planning.

Attention to the cultural narratives that circulate within society allows us to see the discourses of deviance that describe, and create, the poor in our societal imagination. The moral construction of poverty is the idea that people are poor because they are deviant—deviating in the most important senses from their wealthier counterparts. This deviance justifies the state's regulation of the families that the poor create. Further, it justifies punishing them for their ethical and behavioral flaws. This deviance explains the creation of a system of family law for the poor, and it explains why this system differs so dramatically from the system reserved for those with class privilege, who we have no reason to suspect of harboring an analogous deviance.

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Notes

1 Many scholars have criticized the fact that what is traditionally taught in family law courses tends to be laws that affect the economically privileged; these scholars have condemned the reality that what is labeled "family law" ignores the network of rules and regulations that controls and manages the poor. See, e.g., Janet Halley, "What Is Family Law?: A Genealogy

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2 See Khiara M. Bridges, *The Poverty of Privacy Rights* (Stanford, CA: Stanford University Press, 2017).

3 See, e.g., Moore v. City of East Cleveland, 431 U.S. 494 (1977).

4 See, e.g., Dandridge v. Williams, 397 U.S. 471 (1970).

5 See R. Kelly Raley, Megan M. Sweeney, and Danielle Wondra, "The Growing Racial and Ethnic Divide in U.S. Marriage Patterns," *The Future of Children* 25 (2015): 89–109; Catherine Rampel, "Marriage is for the Rich People," *NY Times: Economix*, Feb. 6, 2012, https://economix.blogs.nytimes.com/2012/02/06/marriage-is-for-rich-people/.

6 Jacobus tenBroek, "California's Dual System of Family Law: Its Origin, Development, and Present Status: Part I," *Stanford Law Review* 16 (1964): 257–317; see also Jacobus tenBroek, "California's Dual System of Family Law: Its Origin, Development, and Present Status: Part II," *Stanford Law Review* 16 (1964): 900–981; Jacobus tenBroek, "California's Dual System of Family Law: Its Origin, Development, and Present Status: Part III," *Stanford Law Review* 17 (1965): 614–682.

7 Moore, 431 U.S. 494.

8 *Id.* at 492 n.6.

9 *Id.* at 506 (Brennan, J., concurring).

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11 See *Moore*, 431 U.S. at 497.

12 See *id.* at 505 n.16.

13 See generally Michel Foucault, *The Archaeology of Knowledge* (1969), trans. Alan Sheridan (New York: Harper & Row, 1972).

14 See Joel F. Handler and Yeheskel Hasenfeld, *The Moral Construction of Poverty* (Newbury Park, CA: Sage, 1991).

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17 Rev. Vivian Nixon, "How Prison Keeps Many Americans Locked into Poverty," *MSNBC*, May 11, 2013, http://www.msnbc.com/melissa-harris-perry/how-prison-keeps-many-americans-locked-p.

18 Nicholas P. De Genova, "Migrant 'Illegality' and Deportability in Everyday Life," *Annual Review of Anthropology* 31 (2002): 419–447, 427 ("The social space of 'illegality' is … a space of forced invisibility, exclusion, subjugation, and repression that materializes around [the undocumented] wherever they go in the form of real effects ranging from hunger to unemployment (or more typically, severe exploitation) to violence to death ɟ"). See also Sherally Munshi's chapter, "Immigration and the Imperial," in this volume.

19 42 U.S.C.A. § 601 (1997).

20 "Aid to Families with Dependent Children (AFDC) and Temporary Assistance for Needy Families (TANF) – Overview," Office of the Assistant Secretary for Planning and Evaluation, U.S. Dept. of Health and Human Services, Nov. 30, 2009, https://aspe.hhs.gov/aid-families-dependent-children-afdc-and-temporary-assistance-needy-families-tanf-overview-0.

21 Khiara M. Bridges, "TANF and the End (Maybe?) of Poor Men," *Boston University Law Review* 93 (2013): 1141–1158.

22 Dandridge v. Williams, 397 U.S. 471 (1970).

23 Under AFDC, states had to apply for a waiver from the federal government before implementing such limitations on grant sizes—limitations that are commonly referred to as "family cap" or "child exclusion" policies. Jennifer S. Madden, "Family Caps Threaten Women and their Children," *Berkeley Journal of Gender, Law & Justice* 10, no. 1 (September 1995): 171–175, 172. TANF departs from AFDC inasmuch as it explicitly authorizes states to implement family cap policies.

24 Meyer v. Nebraska, 262 U.S. 390 (1923).

25 *Id.* at 400.

26 *Dandridge*, 397 U.S. at 484.

27 *Id.* (citing Williamson v. Lee Optical of Oklahoma Inc., 348 U.S. 483, 488 (1955)).

28 Lochner v. New York, 198 U.S. 45 (1905).

29 Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).

30 *Id.* at 668.

31 McDonald v. Bd. of Election Comm'rs of Chicago, 394 U.S. 802 (1969).

32 *Id.* at 807.

33 Goldberg v. Kelly, 397 U.S. 254 (1970).

34 *Id.* at 265.

35 There are, of course, many other types of analyses that one may do with *Dandridge*. One might engage in an economic analysis of the law, interrogating whether the law makes sense from an economic perspective (does it truly conserve Maryland's limited resources?) and whether it will likely incentivize the affected families and individuals to engage in the behavior that the law appears to want to encourage (i.e., incite the heads of indigent household to limit their fertility and seek gainful employment outside the home). Or we might analyze the propriety of the scheme of judicial review that Justice Marshall proposed in his dissent, a scheme that would not consist of two tiers of scrutiny but rather would allow reviewing courts to determine the constitutionality of a law after a nuanced consideration of "the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefit that they do not receive, and the asserted state interests in support of the classification." *Dandridge*, 397 U.S. at 521 (Marshall, J., dissenting). We might investigate whether Justice Marshall's proposed strategy of judicial review is more or less supportable by the text of the Constitution and the intent of the Framers than the scheme of two-tiered scrutiny that the Court currently employs. There are many other possible analyses of *Dandridge*.

36 *Id.* at 529.

37 *Id.* at 484 (majority opinion).

38 For example, a cultural analysis would reveal that Maryland's desire to prevent families receiving public benefits from having higher incomes than families with a wage-earner in the labor market is based on the assumption that families with a wage-earner in the labor market *ought* to have higher incomes than families receiving public assistance. This assumption presupposes that the labor that a worker performs in the labor market is necessarily more valuable than the traditionally uncompensated labor that an individual who is heading a household with dependent children performs in the home. We might be reminded that the labor of managing a household and raising children has been gendered female, historically and presently. Simultaneously, the labor that is performed in the labor market, the public sphere, traditionally has been gendered male. We might wonder whether the gendering of the different types and sites of labor has made it easy to undervalue the labor performed in the home—leading to Maryland's "commonsense" and uninterrogated assumption that families headed by wage laborers ought to have higher incomes than families wholly dependent on public assistance.

39 Interestingly, TANF continues the erasure that the Maryland funding scheme effects. As mentioned above, TANF requires beneficiaries to engage in one or more of the statutorily defined "work activities" for a specified number of hours per week as a condition of receipt of welfare benefits. 42 U.S.C. § 607(c)(1)(B)(i) (1996). As the defense of Maryland funding scheme presages, the work of raising a young child is not "work" within the meaning of the statute.

40 *Dandridge,* 397 U.S. at 486 n.20 (noting that "no family members of any of the named plaintiffs in the present case are employable").

41 Thomas Byrne Edsall and Mary D. Edsall, *Chain Reaction: The Impact of Race, Rights and Taxes on American Politics* (New York: Norton, 1991), 148.

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43 Khiara M. Bridges, *Reproducing Race: An Ethnography of Pregnancy as a Site of Racialization* (Berkeley: University of California Press, 2011), 201–251.

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45 Ibid., 1669.

46 Dandridge v. Williams, 397 U.S. at 484.

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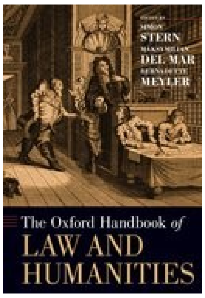

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CHAPTER

26 Human Rights

Elizabeth S. Anker

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Abstract

Debates about human rights in many ways represent one of the original sites of law and the humanities. This chapter canvasses the different ways that humanistically minded thinkers have understood rights, both today and over history. On the one hand, human rights have been the target of sustained critique, as scholars have probed their many errors and limits. But on the other, different humanists have instead affirmed rights, seeing them as enabled by the same openings and indeterminacies that are broadly constitutive of democracy. Attention to the limits of rights has also brokered that embrace. By exploring these competing responses to human rights, this chapter construes those disputes as a referendum on larger ideas about law and legality that inform law and the humanities. Analyzing human rights has therefore often seemed to fulfill an almost autobiographical function for thinkers across a number of humanities disciplines, meaning that the status of human rights can tell us a lot about received accounts of the value of the humanities.

Keywords: human rights, interdisciplinarity, critique, limits, humanitarianism, UDHR, humanities, critical legal studies

Subject: Jurisprudence and Philosophy of Law, Law and Society, Human Rights and Immigration, Law

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PRINCIPLES of right and rights, civil and human, in many ways represent one of the original applications of law and the humanities. This has been true both historically and during the contemporary institutionalization of law and humanities as an interdisciplinary nexus. Such interest in human rights has furthermore extended across humanities fields, instigating what some have deemed a “human rights turn” within a number of disciplines, including anthropology, history, literary studies, and political theory, among other fields.

This centrality of human rights to law and humanities-based scholarship should not be surprising. Principles of rights have preoccupied not only lawyers and politicians but also artists, philosophers, and writers since their late-eighteenth-century inclusion in various revolutionary constitutions. While since these beginnings rights have been the frequent subject of treatises and novels alike, their norms were both perfected and disputed in the sorts of forums and contexts we now associate with humanistic inquiry. More recently, debates over rights helped to pilot a number of intellectual breakthroughs and shifts. In both the rise and splintering of the disciplines, those debates about rights similarly catalyzed new subfields, whether science and technology studies or critical race theory, and spurred larger movements. For these and other reasons, one cannot account for law and the humanities without reserving a central part for human rights in those adventures. The emergence and evolution of humanistic approaches to law in key respects *is* an odyssey of human rights, from their earliest instantiations into the present.

This long-standing partnership connecting human rights to the humanities, however, has simultaneously incited profound ambivalence. From the start, human rights have met with notably mixed or divided sentiments. Objects of sustained critique, human rights can, on the one hand, appear beholden to everything flawed or broken about law and legalism generally. Much law and humanities scholarship has therefore dedicated itself to the project of interrogating rights—often by revisiting complaints about rights that have been around for centuries. On the other hand, human rights have denoted bold, aspirational ideals that many humanists (including left theorists) have instead ↳ embraced, even while multiple, complicated factors have permitted that acceptance. Here, too, human rights can seem to embody everything salutary and desirable about not only the humanist tradition but also its place in the twenty-first-century university. This is all to say: there is something deeply autobiographical about much law and humanities work on human rights, whether actualized in critique or the affirmation of rights principles. In either case, human rights can resemble a screen onto which humanists project their own interests, in the process offering a sounding board for the negotiation of whatever anxieties of influence trouble a range of humanities fields.

Competing, changing views about human rights can accordingly reveal a lot not merely about rights as a construct but also about humanists' fraught relationship to law. This chapter therefore examines conflicts over rights (contemporary and historical) for exactly such insight into certain enabling assumptions underlying law and the humanities. While a distinct site of inquiry, rights-based scholarship exemplifies many styles of analysis that have governed law and humanities scholarship arguably since its genesis—for this reason similarly laying bare comprehensive methodological feuds and rifts.

26.1 The Contradictory Limits of Rights

The prominent inclusion of rights declarations within many revolutionary constitutions understandably motivated some of the earliest critiques of rights. At once, there are key senses in which those inaugural and other critiques of rights have maintained a strikingly similar tenor since. Already in eighteenth-century philosophical discourses on rights, commentators seized upon their many limits, often outright defining rights in terms of those ambiguities and contradictions. This was the thrust of Jeremy Bentham's early quip that rights are "nonsense upon stilts."[1] It was also the spirit of early feminist challenges to rights, for instance in the French revolutionary context.[2] And in many ways Karl Marx's influential discussion of rights in "On the Jewish Question" similarly probed a limit of rights: namely, that rights logic would reinforce the egoistic behavior encouraged by capitalism.[3] Those early diagnoses have frequently functioned as touchstones for humanists, seen to capture inherent if indeterminate truths about rights, including their opportunities and frontiers. A diverse array of thinkers have for instance touted as foundational basic p. 483 recognitions concerning the exclusionary architecture of ↳ rights, or the innate exceptions that both constitute and interrupt their universality.[4] These contradictory limits were, for instance, theorized by Hannah Arendt as a "perplexity" in the wake of World War II.[5] For Arendt, it is therefore the "right to have rights" (rather than rights per se) that represents the essential determination for any rights claimant.[6] Scholars of rights, however, have reached strikingly different conclusions about the nature and effects of those exclusions that ironically curtail the very universality rights purport to guarantee. Nonetheless, even while lamenting the practical and other failures of rights, many theorists have simultaneously explained those contradictory limits as counterintuitively productive. Even when (like Arendt) contemplating the predicament of populations denied rights protections due to citizenship, gender, race, or the other bases of discrimination, theorists have frequently extolled the limits of rights as fertile and regenerative.

Entire schools of thought have accordingly arisen to contend with these and other limits of rights, offering various accounts of why and how they are fundamental or otherwise telling. Frequently, those tensions have been taken to index broad conundrums of democratic legitimacy, in reasoning that treats rights as paradigmatic incarnations of frictions broadly endemic to democratic practice. Those paradoxes of democracy are themselves usually located within a long genealogy, for many one first grasped by Rousseau and encapsulated in his query: "What makes a people a people?" For Rousseau, democracy is marked by an abiding indeterminacy that, above all, surrounds the fact that it must presuppose "a people" ex ante, even though that category's existence and nature is molded retroactively by law.[7] Seen to be foundational and hence beyond resolution, these and other ambiguities of democracy and rights have been returned to by rights theorists again and again, suggesting one reason for why inquiry into the limits of rights can seem inexhaustible.

Attention not merely to human rights but specifically to their innumerable limits thus represents its own academic genre or mode—one convention of which has been to revisit key historical episodes as well as seminal texts and thinkers (like the above) to build upon and enlarge their initial discoveries. Given this established canon of theories and theorists, it is not surprising that emphasis on contradictory limits would become the dominant frame for making sense out of human rights. In fact, one would be hard pressed to find a humanities-based discussion of rights that, in some regard, does not cite those limits as a starting point if not an overarching method and agenda. When it comes to rights, that diagnosis has become virtually compulsory. That one must, as Wendy Brown puts it, "suffer the paradoxes of rights" has become a p. 484 baseline supposition ↳ that can seem to precede any meaningful, astute conclusions about rights and their many dimensions.[8] And no doubt, there is little question that, with the increased visibility of human rights discourses in the late twentieth and twenty-first centuries, those limits have only multiplied exponentially—to vastly exceed whatever challenges confronted their initial revolutionary-era legalization. Hence, ruminations on the historical perils of rights can ring true with ever-greater force and clarity today.

To enumerate those multiplying limits of rights would require a separate chapter, given the many hurdles and other disappointments that attempts at the realization and enforcement of human rights have widely encountered.[9] Nevertheless, particular humanities disciplines have understandably emphasized certain of those challenges, whereas others have focused on different ones. Here, too, scholarship on human rights can appear deeply autobiographical, as a type of forum adjudicating entire fields' troubling historical ties and contemporary commitments. For instance, anthropologists have broadly contended with the present-day contamination of rights by the ongoing dynamics of the colonial encounter—in the process, probing that field's own historical complicities with imperialism. One tragic fact of much human rights discourse and activism today involves how human rights can operate as weapons rather than shields for many regions of the world, being foremost targeted at the global south. Even the best-intentioned human rights advocacy can thus inadvertently buy into the impulse to cast the humanitarian crusade as a civilizing mission aimed at rescuing non-European and American lives from conditions of either passive victimhood or debased savagery.[10] Humanitarianism, in other words, continues to be motored by the enduring codes and conventions of the rhetoric of empire; it can mobilize the same stigmas that have lent ideological sanction to unapologetic imperialism. In its earlier phases, anthropology helped to construct and ratify many of those underlying assumptions, perhaps foremost the premise that certain "cultures" can be reduced to passive objects of knowledge that other "civilizations" claim intellectual mastery and authority over. In turn, the fear that human rights are merely the latest technologies of legal imperialism—as such, reproducing such a hierarchy of cultural development—simultaneously encodes anxieties about the enabling errors of anthropology as a discipline. Substantial work on human rights by anthropologists has accordingly set out to exorcise those disciplinary ghosts, just as interrogating the neo-imperialism of rights can promise to remedy the field's own blunders.

Literary critics have analogously linked human rights in self-incriminating ways to central orientations of their field, thereby enlisting debates about human rights as vectors of autocritique. For many literature scholars, rights principles are cognate to, bearing natural affinities with, specific features of the literary—whether the evolution of certain genres (like the novel) or distinct emotions, affects, and/or aesthetic p. 485 devices and ↳ registers. Hence, literary critics have tended to define human rights through a family resemblance or other homologies with art and literature. For instance, Lynn Hunt's 2008 *Inventing Human Rights: A History* explains human rights as vehicles for fostering empathy and interiority, and she therefore ties the flowering of respect for rights in the late eighteenth century to the growth of a literate, and especially novel-reading, public. Hunt's study, however, has met with sustained critique precisely because she celebrates these faculties of empathy and interiority in an uncomplicated fashion, whereas contemporary literary criticism largely views those faculties with suspicion. Rather than inherently ethical, emotions like sympathy and empathy, critics caution, encourage self-referentiality and rest on prior determinations of similarity and likeness that, akin to principles of rights, fast become exclusionary.[11] While the premises underlying Hunt's study may be misguided or passé, thought, the tensions they gauge nonetheless suggest why a turn to human rights has prompted self-appraisal among literary critics, eliciting scrutiny of that field's own allegiances and investments, contemporary and historical.

In such ways, Joseph Slaughter's 2007 *Human Rights, Inc.: The World Novel, Narrative Form, and International Law* sheds further light on the complicated liaisons between literature and human rights, as well as why those ties might incriminate literary studies. *Human Rights, Inc.* primarily explores the enduring partnership between the novelistic genre of the *Bildungsroman* and rights, in particular the fiction of the individual supporting both of their logics. For Slaughter, the circulation of the *Bildungsroman* in the eighteenth century and into the present has provided a type of missing cultural warrant that helped to naturalize abstract rights principles, given how that narrative form plots the development and maturation of the liberal individual culminating with that subject's entrance into a sort of liberal democratic public sphere.[12] Far from triumphant, however, Slaughter's study underscores the casualties of that affinity, focusing on how it has disciplined the claims of rights petitioners especially from the global south. As such, the coalition between literature and human rights that Slaughter investigates compels a reckoning with the conservatism of the very literary forms that—in dialogue with rights principles—consolidated the institution of criticism. In other words, whatever limits trouble the politics of the *Bildungsroman* also afflict literary studies, and insofar as human rights norms are exposed as problematic, literary criticism, too, becomes entangled with those failures. So the parallel Slaughter erects between the *Bildungsroman* and human rights might be taken to levy a self-indictment of literary studies along with numerous of that discipline's self-justifications, as human rights are a recipe for self-scrutiny.

Something parallel has occurred within the discipline of history. Given how human rights norms are often p. 486 understood to marshal ideas about progress and development ↳ (individual and social), their trajectory mirrors the conventional arc through which history has been plotted. Substantial work in the humanities over the past decades has, however, discredited such ideas about civilizational advancement as inherently colonizing, domineering, and oppressive. This has been a key agenda of revisionist historiography, and it has also represented a primary basis for critiquing rights, as we've seen. For a time, progress-oriented renditions of human rights prevailed, inscribing rights within victorious narratives of success and overcoming. Mary Ann Glendon, for instance, popularized such a story of the Universal Declaration of Human Rights (UDHR), while applauding Eleanor Roosevelt's role in shepherding that process. Whereas for Glendon the United Nations' successful adoption of the UDHR foremost disclosed human rights to be instruments of multicultural harmony capable of transcending cultural particularism,[13] recent revisionist histories have contested such idealized portraits not only of human rights but also of the forward march of history. This, in many ways, is the thrust of Samuel Moyn's wildly influential 2010 *The Last Utopia*, which locates the rise of human rights not in the 1940s (with the UDHR) but instead the 1970s. For Moyn, the global propagation of human rights involved "construction rather than discovery and contingency rather than necessity." In addition, for Moyn this flourishing of human rights directly arose out of conditions of failure—namely, the collapse of the radical left.[14] Moyn's account of the genesis of the international human rights movement importantly corresponds with Kristen Ross's work, although Ross focuses on the post-1968 fate of the left in France. For Ross, too, human rights ironically required the disappointment of 1960s-style left radicalism, and it was in the ashes of the student protest and countercultural movements that popular faith in human rights was born.[15] Nevertheless, something more than the ultimate politics of human rights is at stake in both studies. At once, both Moyn's and Ross's challenges to self-congratulatory renderings of human rights stage pointed rebukes to certain tenets of history as an enterprise, cross-examining the temptation to conceive of history-writing as the fulfillment of some larger destiny.

The method informing Moyn's and Ross's scholarship importantly exemplifies substantial work in law and the humanities. One of Moyn's self-aware tactics for destabilizing received histories of human rights involves the discovery of "contingencies," accidents, and contradictions in the record, and those discontinuities are what productively undermine and thereby revise facile plottings of human rights as a success story. In Moyn's counter-history, these sites of contingency are thus freighted with potency; they are imagined to thwart not only dominant histories of rights but also the imperialism, power, and other disciplinary violence accompanying them. Such expectations for contingency and contradiction, I've suggested, are far from confined to Moyn's or Ross's thinking. To stay with histories of rights, a similar p. 487 faith organizes Joan Scott's classic ↳ 1996 *Only Paradoxes to Offer*. Scott's account similarly proceeds by demystifying the usual tendency to narrate women's rights as "a teleological story of cumulative progress," instead highlighting the "intractable contradictions" that have haunted the advancement of a feminist agenda over history. Indeed, Scott actively celebrates those contradictory limits (as evident in her title) as *both* a vehicle enabling her own methodology of historical revisionism *and* an attribute of human rights principles that feminists, over history, strategically exploited. So Scott endows revisionist historiography and the latent possibilities of human rights with symmetrical expectations. In addition, Scott creates a third parallel that also hinges on the power of negative limits. Even while Scott excavates the contradictions that have (ironically) facilitated the spread of human rights, she overtly recommends the staging of contradiction as a mechanism of resistance. While finding an analogue in the architecture of rights, Scott's scholarly method and proposed template for real-world political change derive from one-and-the-same instruction manual. Scott explains: "[T]he identification and display of inconsistency and ambiguity—of self-contradictoriness—within an orthodoxy that strenuously denies their existence is surely destabilizing and sometimes even transformative."[16]

Something noteworthy emerges here, and not merely because Scott and Moyn and Ross all rely on similar ideas about non-dominant history writing. Variations on those styles of analysis more accurately connect a wide range of thinkers across law and the humanities. Each of those three thinkers differently recruits the exact same limits of human rights—first and foremost, the exceptions to their universality—to demonstrate why they are ripe for manipulation. Scott is perhaps most explicit in testifying to these powers possessed by those contradictory limits. Touted as the basic strategy feminists deployed in agitating for women's rights over history, Scott explains of feminist agency, "it is an effect of ambiguities, inconsistencies, contradictions within particular epistemologies."[17] Although while Scott thus promotes those discordances as calculated tools of oppositionality and action, they furthermore comment self-reflexively on Scott's understanding of her own approach to history. Scott proceeds by maneuvering the ambiguities that lurk within established frameworks for conceptualizing reality (like rights) to exploit their resistant and, in the end, transformative capacities. The exact same limits that Scott celebrates for engendering feminist agency thus simultaneously characterize Scott's own intellectual method and mindset.

That said, another point involves how this emphasis on the fertile dynamics of ostensible limits ultimately delivers something of a self-diagnosis. Scott's ruminations on the predicament of feminism could equally be taken as a commentary on the plight of the humanities as she relates, "It is precisely because feminism embodies paradox that it has been trivialized or consigned to marginality by those seeking to protect the foundations of whatever status quo they represent." Forever marginalized by positivistic, scientific, fact-oriented disciplines, many humanists have long understood their roles, both within the university and with reference to dominant political and social orders, in terms of such a mindset. Indeed, this spirit of
p. 488 contrarianism captures the humanities' posture ↳ toward law within that interdisciplinary juncture. As the *Oxford English Dictionary* defines paradox in one entry: "A statement or tenet contrary to received opinion or belief." Insofar as law inhabits the commonsensical or received, paradox therefore also names the labor of humanistic inquiry relative to legalism's mainstream truths. This shared investment in contrarian critique (rather than the "human" at their roots) is thus one source of conviviality between human rights and the humanities.

Variants of this dedication to what Scott calls "self-contradictoriness" exist within not only historiography but countless other sites of humanities-based inquiry into human rights. When Scott imagines human rights to be inherently resistant, transformative, and even redemptive, her thinking joins a much broader tendency within the tradition of criticism and theory (beyond law and the humanities) to herald contradictory limits (and indeterminacy, openness, aporia, indecision, alterity, and a range of other such qualities), as the primary property that vests human rights with just, ethical, and/or radically democratic potential. Indeed, for some left theorists, equating human rights with different species of fertile indeterminacy and ambivalence provides the axis that permits their intellectual and political embrace. While Scott's work encapsulates one brand of such thinking, human rights have similarly been incorporated into a deconstructive or poststructuralist ethics through such an espousal of those constitutive limits, in reasoning that also treats rights as conduits for an ethics of "otherness" and alterity. The literary critic James Dawes, for instance, advocates a human rights pedagogy grounded in such reasoning. As Dawes argues in a CNN feature on Syrian rebels (now ISIS), the psychology of a perpetrator can be partly attributed to hostility toward indeterminacy. Perpetrators, for Dawes, have been trained "to think that the world is painted in black and white, not shades of gray." They are captive to either-or, black-and-white, friend-enemy, pure-impure, Manichean habits of thought.[18] While there is nothing inherently amiss about this diagnosis, Dawes's solution or cure is nonetheless telling. Namely, Dawes advocates (among other things) teaching grounded in "ambiguity and uncertainty" aimed at inculcating the recognition that "there aren't easy solutions to complex problems." Relatedly, he urges parents to teach their children "to seek out 'the other.' "[19] So what Dawes effectively does is to champion those qualities as natural antidotes to abuses of human rights, or an automatic stave against radical evil.

26.2 Critiquing Rights

So far, I've primarily investigated one strain of law and the humanities—one we might associate with poststructuralism and the linguistic turn. Yet there is another equally, if not more, influential vein of p. 489 humanities-based scholarship on law that instead submits ↳ human rights and rights logic broadly to sustained critique. To be sure, this affinity of rights and critique is one that fully gestated the emergence of modern principles of rights. Even as a humanistic spirit of critique engineered the eighteenth-century codification of rights in various revolutionary constitutions, principles of rights from those beginnings were themselves conceived as implements of critique; they issued powerful statements of opposition to tyranny and oppression. At the same time, humanistic thought was enlisted to hone, appraise, and otherwise fashion those early articulations of rights. These synergies between rights and humanistic critique that governed their twinned inceptions have assumed many different shapes and guises ever since.

These historical and contemporary liaisons between critique and ideas about rights can, not surprisingly, help us take further stock of law and the humanities today. For instance, the Critical Legal Studies movement (CLS) in the 1970s and 1980s often placed disputes over rights on the front lines. For CLS thinkers, rights were a battleground, and the onus to critique rights represented one of the main agendas driving that movement—and one that further mandated its dissent from legal orthodoxy. Many first-generation CLS thinkers accordingly sought to demystify the alleged successes of the rights revolution in US courts and legal culture. Landmark CLS texts by scholars such as Mark Tushnet, Peter Gabel, and Robert Gordon all variously decry the many limitations and errors afflicting the construct of rights. That early momentum was thereafter directed at rights-based exclusions tied more narrowly to race, gender, empire, and other such guises of power, and these critiques continued long after CLS had, by most accounts, been marginalized. In fact, the sorts of complaints ventured in Patricia Williams's 1992 *The Alchemy of Race and Rights*[20] still carry much traction today, finding new currency in among other contemporary expressions of rights-based critique texts like Richard Ford's 2011 *Rights Gone Wrong*.[21] At different stages, other legal scholars transferred such concerns about specifically civil rights to an international forum and to human rights. Those adaptations of various axioms of CLS have likewise been enormously influential. Books like David Kennedy's and Makua Mutua's interrogate the imperialism of international human rights along lines at least in part developed in the American context during earlier decades.[22] Importantly, these texts remain widely taught, such as in the curricula of human rights clinics within many law schools.

Just as CLS scholars rallied around critiques of rights, adjacent debates about rights helped to spawn a number of new subfields and interdisciplines, whether feminist and gender studies or science and technology studies or postcolonial theory. Many of those sites of inquiry have since become securely established as independent interdisciplinary domains—often institutionalized as "majors" or "programs" or "institutes" or "centers," whether in law schools or the university at large. Within the legal academy, p. 490 certain of those subfields are to varying degrees spinoffs of CLS, protracting that movement's ethos ↳ after the dissipation of its initial energy. At the same time, others (such as Critical Race Theory) instead arose as direct reactions against CLS. In whatever guise, though, disagreements over rights and their ultimate purchase on matters of social justice have propelled innumerable advances in higher education, just as feuds over the status of rights continue to preoccupy a number of humanities fields, perhaps most prominently those focusing on questions of race and other marginalized identity positions.[23] All in all, it is hard to account for important shifts and innovations within not only law and the humanities but also the humanities broadly without telling a story centered on the ways rights have acted as a spur and impetus.

What these changes further dramatize are the frequent skepticism and negativity that have colored many humanistic discussions of rights, human and civil. Some prominent threads of law and humanities scholarship have, perhaps understandably, been animated by profound suspicion of law—or the premise that law should, first and foremost, elicit negative critique. While wariness about law might seem intrinsic to the genetics of an approach like Critical Race Theory, suspicion of the legal system has also shaped interdisciplines like law and literature in ways we've already seen. Much law and literature scholarship can presume a law-bad versus literature-good binary, wherein a core value of the literary becomes its exposure of the flaws of law and legalism.[24] Needless to say, that bifurcation of literature from law can fast become reductive, especially when it depends on caricatured, straw-man-like ideas about the legal system. In addition, it can glorify the humanities, characterizing humanistic inquiry as an inherently ethical or just corrective to law. In either way, the interdisciplinary encounter is structured in terms that permit the humanities to play savior relative to an unambiguous scapegoat (law) that is always already vulnerable to attack.

A few things are relevant here. To begin, insofar as law and the humanities can rest on justifications that are, at base, autobiographical, that emphasis on the negative limits of law serves to redeem humanistic inquiry and the interdisciplinary nexus. Law can seem to need the humanities more than vice versa: both to effectuate vital critiques of law and to imagine possible alternatives. Such configurations of law and the humanities can, in turn, leave humanists feeling neatly validated in their labors—and especially when it is a foregone conclusion that law will be exposd as broken (or rights revealed to be limited). The long tradition of critiquing rights thus not only can entrench dichotomizing mappings of law and the humanities but also can polarize them into a Manichean drama of good and evil. Diagnosing rights by way of their limits
p. 491 guarantees the humanities the ↳ upper hand, ensuring that the exercise of critique will prove superior. Relatedly, the onus to demystify rights becomes a methodological fait accompli, in an intellectual exercise certain to betray law's endemic flaws and corruptions. In short, one might conclude that the centrality of debates about rights to law and the humanities has itself instilled the presumption that law should foremost occasion doubt and suspicion.

One effect of academic interest in human rights, then, has been an anti-legalism. No doubt, this may seem ironic, even though humanists justify a lot when their work is subsidized by the onus to pillory law. Such an anti-legality bias, I've tried to show, has been fostered and reinforced by both contemporary and historical attention to rights. While the impetus to critique rights extends from deep historical roots, recent innovations in critical theory have only intensified—representing perhaps the most extreme expressions of—that anti-legalism. In particular, biopolitical thought and theories of sovereignty have exacerbated a sense of profound and chronic fatalism over human rights. Within Giorgio Agamben's widely read theory, for instance, the codification of rights principles in law fully creates the legal landscape that provided the foundation for the Holocaust. While Agamben's reasoning is complicated, he in effect describes the limits of citizenship earlier seized on by Arendt as ripe for manipulation, and in ways that directly facilitated the betrayal of human rights principles. For Agamben, those structural exceptions to rights and citizenship furthermore constitute the "paradigm of modernity," and as foundational they not only laid the Holocaust's legal groundwork but also become inescapable—which is why Agamben cautions about an "inner solidarity between democracy and totalitarianism" that causes "Nazism and fascism [to] remain stubbornly with us."[25] For Agamben (and Arendt), precisely when the otherwise abstract limits of rights are formalized in law do those failures gain legal and ontological certitude.

While biopolitical thought like Agamben's can appear extreme, versions of his anti-legalism structure a rather remarkable range of law and humanities scholarship. Indeed, anti-legalism has become fully doctrinal within certain law and humanities conversations, for instance, representing a kind of default position within work on neoliberalism. In the volume *Left Legalism/Left Critique* Wendy Brown and Janet Halley set forth certain of the warrants underlying such a mindset. As they explain, “Submitting left projects to the terms of liberal legalism translates the former into the terms of the latter, a translation which will necessarily introduce tensions with, and sometimes outright cancelations of, the originating aims that animate left legalism in the first place.”[26] In such logic, reliance on law entails an almost automatic selling out, as Brown and Halley presume that recourse to the institutions of law will inevitably forfeit or forsake one’s principles and goals. Although they raise valid worries about certain risks p. 492 accompanying legal process, such reasoning has rendered anti-legalism compulsory in certain ↳ fields of inquiry, causing terms like the “juridical” or “legality” to carry innately pejorative associations.[27] To be sure, with regard to many systemic injustices (like those tied to race and the criminal justice system), these warnings about law and legality can make a lot of sense. Nevertheless, the language of the “juridical” often gets reductively turned into a blanket condemnation or epithet, causing the interdisciplinary juncture itself to sound like a contradiction in terms.

26.3 Renewing the Humanities

What emerges from all of this is a picture of law and the humanities noticeably divided in its ideas about human rights, as many of those divisions furthermore map directly onto conflicting views about law as aninstitution. As such, this landscape can simultaneously divulge deep ambivalences within the humanities overall—ambivalences surrounding humanists’ basic mission and rationales for existence. Differences in opinion over human rights can thus illumine fault lines within the broad terrain of humanistic inquiry, especially in the midst of a mounting crisis in higher education that places existing defenses of the humanities under unprecedented assault.

At first blush, a human rights turn might appear to replenish and reinvigorate many of the humanities’ core commitments. Humanistic in their spirit, human rights might repair scholars’ commitments to that tradition, heralding a politically invested though noncontroversial commitment to social justice for the humanities. They similarly might seem to offer an organizing principle for fields long allergic to normativity and legality alike. At the same time, human rights quite differently provide an attractive warrant for humanists’ existence in the eyes of budget-conscious, cost-cutting administrators. What better goal and vision for salvaging the humanities than human rights? Moreover, if the humanities have all along been enmeshed with human rights, how can one possibly be against either? A human rights turn—or rather return—might therefore compel a valuable renewal and reminder, regrounding the humanities in their origins while warding off the looming threats of the twenty-first century.

However, even as interest in human rights has burgeoned, much of it has, we’ve seen, been aimed at critiquing rights: at exposing the many errors, failures, and limits of rights logic. Principles of rights have, more often than not, inspired forms of opposition and negativity from law and humanities scholars, echoing a climate of rights skepticism that has also taken hold among many social scientists and within the international human rights monitoring community. In addition for humanists, that skepticism can extend from a larger attitudinal-methodological posture of critique that is, however, increasingly under attack p. 493 within different humanities fields. These concerns about what Rita ↳ Felski terms the “limits of critique” are therefore also highly pertinent to law and the humanities.[28] For instance as Felski and I address in *Critique and Postcritique*, one objection to critique is that it “has been normalized, domesticated, or defanged through its own popularity,”[29] in other words both representing too much of what humanists do and in effect becoming compulsory. The point here is that critique, of the sort visited upon human rights, is not inherently wrong or misguided; in fact, norms like human rights exhibit why critique can be urgent and necessary. Rather, the concern is that the hegemony of critique privileges certain modes and aspects of reasoning while blinding us to other equally if not more valuable dimensions of intellectual engagement—political, legal, and otherwise. When doctrinal, critique leaves multiple goals of humanistic inquiry by the wayside, if not fully writing them off.

For such reasons, debates about critique and skepticism respond to their own perception of impasse: a condition that also obtains within some areas of law and the humanities. As I've suggested, even while possessing an illusion of muscularity, thoroughgoing critique can backfire, becoming depoliticizing in ways that can seem to foretell humanists' own marginalization. We can readily envision why this would occur for human rights. The impetus to critique rights certainly aims to compromise, if not fully defeat, their authority—an agenda that will naturally deplete popular enthusiasm for rights and their political promise. It goes without saying that critiques of rights rarely aspire to buttress or enhance their legitimacy or attractiveness; rather, rights critique proceeds through exposure and tearing down. For such reasons, it has typically been anti-reformist, anti-normative, and anti-institutional in its basic tenor. However regarding rights, this blanket negativity can be self-sabotaging, especially if one wants to preserve rights as necessary fictions or aspirational ideals—forward-looking commitments channeling a dedication to social justice. Human rights may be imperfect, but it's hard to imagine the pursuit of a better world without them.

Hence, human rights offer a referendum on the stakes of humanities-based critique broadly, vivifying why many humanities fields, torn between critique and affirmation, are currently metabolizing a deep-seated crisis over intellectual life's primary goals and labors. That ambivalence, moreover, retraces historical lines of friction within philosophical debates over rights. Studying human rights can therefore tell us a lot about the origins as well as contours of long extant tensions within the humanities. Being themselves fundamentally ambivalent, human rights raise questions about their own limits. Are the political-legal limits of rights lethal and indicia of failure? Or do they instead represent fertile openings and p. 494 indeterminacies that can mark the very location and ↳ beginning of justice and politics? Should these limits of rights be decried and critiqued, or instead embraced and harnessed? Are their norms oppressive as merely the latest ideological sign of false consciousness, or instead something enabling and to be believed in? These, in many ways, are questions that have all along animated humanities-based inquiry into law.

As a window on present-day conflicts over among other things method, the history of human rights can further provide a corrective to the picture of law and the humanities I've sketched: a picture that envisions that interdisciplinary alliance as riven by competing impulses. One frequent tendency within disputes over humanistic method has been to rely on an "either-or" framing of such divergences. For instance, many recent contentions over critique have been cast as a choice in an "either-or" polarity: as something either one does or doesn't practice, without moderation or gray areas in between. To be sure, advances in intellectual history often stage their departures through stark antitheses and bold rejections. Within recent assessments of the humanities, "either-or" rhetorical strategies are therefore nothing new. However, the long history of human rights in law and the humanities can also expose why those schismatizing tactics are simplifying and inaccurate; they minimize complexity and occlude the richness and dynamism of intellectual practice.

More accurately, human rights are a tale of the "both-and." Already with their initial codification in early democratic constitutions, human rights acted as *both* instruments of critique *and* qualitative ideals. They were *both* mechanisms for articulating oppositional dissent *and* normative guidelines designed to forge and foster political community. Ever since, legal and social articulations of human rights principles have frequently sustained those dual orientations; indeed, we might say that the very synchronicity of these dynamics is why human rights norms have both mutated and persisted. Precisely the synergies between negative critique and value-based affirmation embodied in human rights have been the wellspring of their viability. Theories that paint rights as either mired in fatal limits or singularly redemptive thus overlook their enduring capacity to harness the "both-and." That posture, I'll suggest, is one many humanists would benefit from emulating. As a playbook in how critique and affirmation can operate in unison or tandem, the history of human rights therefore contains many lessons for humanists, modeling why those energies not only *can* but more importantly *are* in practice fused if not fully coterminous. After all, just as human rights principles since the late eighteenth century have enabled a revolutionary spirit of just and ethical resistance, they have at once organized that ethos into coherent, attainable legal norms and principles.

Law and humanities scholarship has tended to forget in particular one half of this “both-and” nexus. As I’ve suggested, scholars have tended to prioritize the critique of law. However, human rights demonstrate why that specter of legalism has been unduly aggrandized and inflated. Even more, they dramatize the need for a law and the humanities invested in construction, building, development, reform, and the crafting of p. 495 normative principles. No doubt, these ambitions may reek of a classically “liberal” agenda ↳ and hence something many humanists have been wary of.[30] However, the real-world opportunities of human rights mandate a rethinking of certain left orthodoxies—an examination of left critique’s own internal normativities. Rather than a neoliberal ruse, human rights have long been a battleground *within* left intellectual life, and for reasons that are worth taking seriously especially given how they have actively engendered law and the humanities.

26.4 Conclusion

In sum, recent enthusiasm over human rights might seem to betoken a rejuvenation not only of law and humanities interdisciplinarity but also of the humanities overall. While a bit rosy-eyed, that assessment does possess significant purchase—although not for the reasons we might expect. In our contemporary geopolitical climate, there is, no doubt, need for urgent and incessant critique, and humanists have become well-versed in that activity. Likewise, there is little question that human rights have and will continue to provide an important lever and rationale for that criticism. However, human rights are also reminders of why critique alone will prove deficient, as their history further testifies to the onus to build, develop, fashion, improve, reform, and construct—even if tempered by a necessary guardedness and realism.

Many veins of law and the humanities would conceive of critique and affirmation as opposed: as existing in friction or competition. These tributaries of critical inquiry would tell us that critique and affirmation are fated to diverge, if not outright conflict, in an “either-or” binary. However, the story of human rights suggests something very different, illustrating why those dual faculties not only *can* but rather *must* be counterparts in ways that continually supplement, reinforce, offset, and recalibrate one another. Human rights, in other words, amalgamate the “both-and,” and that ethos is one that we might claim for a twenty-first-century law and the humanities.

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Notes

1 *Anarchical Fallacies* (composed between 1791 and 1795 and published in 1816 in French).

2 For a discussion of Olympe de Gouges and her *Le bonheur primitif de l'homme* (Paris, 1788), (Cambridge, MA: Harvard, 1996), 19–56.

3 "On the Jewish Question," in *The Marx-Engels Reader* (1844), 2nd ed., ed. Robert C. Tucker (New York: Norton, 1978), 26–52. Arendt enlists the language of "perplexity" to theorize these paradoxes of rights.

4 See Scott, *Only Paradoxes to Offer*; Jacques Ranciere, "Who Is the Subject of the Rights of Man?" *South Atlantic Quarterly* 103, no. 2–3 (2004): 297–310.

5 *The Origins of Totalitarianism* (Berlin, Germany: Schocken Books, 1951).

6 For a recent discussion of this remark, see Stephanie DeGooyer et al., *The Right to Have Rights* (New York: Verso, 2018).

7 *Of the Social Contract*, trans. Richard W. Crosby (Brunswick, OH : King's Court Communications, 1978), 71.

8 Wendy Brown, "Suffering Rights as Paradoxes," *Constellations* 7 (2000): 208–229.

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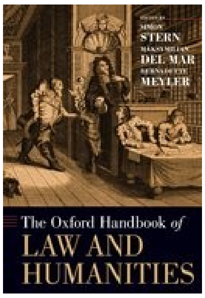
27 For some examples among many, see Butler, *Gender Trouble*; Cacho, *Social Death*; Dayan, *The Law Is a White Dog*; Weheliye, *Habeas Viscus*; Puar, *The Right to Maim*.

28 *The Limits of Critique* (Chicago: Chicago University Press, 2015).

29 Elizabeth S. Anker and Rita Felski, “Introduction,” in *Critique and Postcritique*, ed. Elizabeth S. Anker and Rita Felski (Durham, NC: Duke University Press, 2017), 13. This rethinking of critique in many ways builds upon Eve Sedgwick’s late work as well as an essay by Bruno Latour, “Has Critique Run Out of Steam?,” *Critical Inquiry* 30, no. 2 (Winter 2004): 225–248. See also Eve Kosofsky Sedgwick, *Touching Feeling: Affect, Pedagogy, Performativity* (Durham, NC: Duke University Press, 2003).

30 Indeed, precisely in such light have disputes over rights at times been taken as an apparent wedge separating liberals from left radicals, as Duncan Kennedy observes. “The Critique of Rights in Critical Legal Studies,” in *Left Legalism/Left Critique*, Wendy Brown and Janet Halley (Durham, NC: Duke University Press, 2002), 181.



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CHAPTER

27 Immigration and the Imperial

Sherally Munshi

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Abstract

In legal scholarship on immigration, as in public discourse, we often take for granted the normative and conceptual priority of nation state borders—as though borders were here first, and migrants came second. But people have been migrating since long before the establishment of nation state borders. European imperialism was sustained by mass migration. The British imperial system consisted of the voluntary migration of settlers and administrators as well as the involuntary or forced migration of enslaved Africans, Asian "coolies," and criminal convicts. U.S. settler imperialism continues to effect mass displacements. Because the conventional nation-state framing of immigration law often obscures the imperial histories that have shaped the inequalities that now compel migration, this chapter asserts that scholars of immigration law and history have much to gain by displacing the nation-state framework, through which questions about immigration law and policy are raised, and replacing it with an expanded framework of the imperial.

Keywords: borders, migration, imperialism, empire, settler colonialism, race, Asian exclusion, indigenous, critical race studies, postcolonialism.

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IN legal scholarship on immigration, as in public discourse generally, we often take for granted the normative and conceptual priority of national borders—as though national borders come first, migrants second.[1] But human beings have been migrating since long before the establishment of nation state borders. And European imperialism was, of course, sustained by mass migration. As W. E. B. Du Bois remarked in 1920, "Europe has done more to break down national cultures than any preceding culture."[2]

British imperialism consisted of the voluntary migration of administrators and settlers as well as the involuntary, or forced, migration of enslaved Africans, "coolie" laborers, and criminal convicts. In the hundred years before the start of the world war, more than 22 million men and women left the British Isles to settle in the New World, many of them with the encouragement of their government.[3] The transatlantic

slave trade brought an estimated 11 million Africans to the Americas—another 6 million are believed to have died in transit.[4] After the abolition of the slave trade, half a million Chinese and Indian laborers were brought to work in Caribbean plantations; millions more were transported to European colonies in Latin America, Southeast Asia, and the South Pacific as indentured "coolies," laboring under conditions often
p. 498 compared to ↳ slavery.[5] Indians, Chinese, and Africans were also among the estimated 160,000 convicts shipped to Australia between 1787 and 1868.[6] Of course, settler colonialism involved not just mass migration but mass displacement, expulsion, and elimination. In North America, an indigenous population of 80 million was reduced to just 10 million over the course of the sixteenth century.[7]

After centuries of mass migration, voluntary and involuntary, it was the voluntary arrival of a few thousand Asian migrants in the settler New World that gave rise to modern immigration controls in the late nineteenth century, transforming what had long been recognized as a natural right to migration and repatriation into a problem or threat over which the nation state would exercise exclusive authority. In the United States, one of the first federal laws to substantially restrict immigration was the Chinese Exclusion Act of 1882. It was the first to do so on the basis of racial or ethnic difference. In the *Chinese Exclusion Cases*, more strikingly, the US Supreme Court announced for the first time that Congress had an "absolute and unqualified" right to exclude and deport foreigners, "however it may see fit."[8] In the preceding decades, the regulation and restriction of Chinese migration to the United States had been achieved by mutual agreement —by treaty—and Congress's authority to restrict migration was located in the commerce clause of the Constitution.[9] The *Chinese Exclusion Cases* fundamentally transformed the federal government's authority to regulate immigration by asserting that the right to exclude foreigners was a matter of unilateral, sovereign prerogative—inherent to sovereignty, without constitutional limitation or judicial review. In the Court's analysis, Congress's authority to restrict immigration flowed not only from its duty to defend national territory but its right to preserve demographic integrity:

> Every society possesses the undoubtable right to determine *who shall compose its members*, and it is exercised by all nations, both in peace and war † What [a nation] owes to itself, the care of its own safety, gives it this right † [I]t belongs to the nation to judge whether its circumstances will or will not justify the admission of the foreigner.[10]

In this sense, Asian migration to the United States as to other parts of the settler New World gave rise not only to modern immigration control but to distinctly novel articulations of the nation state, as a territorially and demographically bound unity which the national government would enlarge itself to protect.

p. 499 Drawing on recent scholarship in American and ethnic studies, postcolonial and indigenous studies, history and critical geography, this chapter seeks to reframe the study of immigration law by displacing the nation state framework, through which questions about immigration law and policy are generally raised, and by exploring the continuities between imperial expansion in the past and immigrant exclusion in the present.[11] Though legal scholarship on immigration often takes for granted the contemporary international system of nation states, the nation state is itself a relatively recent formation, one that took shape in the twentieth century, against the backdrop of world war, decolonization, and the closing of New World frontiers.[12] After centuries of unprecedented migration, largely controlled by and for the benefit of European empire states and their settler counterparts, the international nation state system, defined by mutual rights to territorial exclusion, would consign all but a fraction of the world's people to their nations of origin. If, as an eighteenth-century statesman proposed, "empire is the art of putting men in their place," then the twentieth century will have shown that immigration control is the art of keeping them there.[13]

This chapter seeks to reframe the study of immigration law in the United States by displacing the framework of the nation state, through which questions about immigration law and policy are often framed, and replacing it with an expanded framework of "the imperial." Following Paul Kramer's lead, I use the phrase "the imperial" rather than "empire" to designate a mode of inquiry rather than a fixed object of study.[14]

Ann Laura Stoler and Carole McGranahan use the phrase “imperial formation” to emphasize the “active and contingent,” overlapping and contradictory character of political, economic, and social processes that make and unmake peoples and places ordered in varying degrees of dominance.[15] “Imperial formations are not steady states,” they insist, “but states of becoming ǂ in constant formation.”[16] Writing of the United States, Alyosha Goldstein reminds us that the United States itself consists of “a historically variable and uneven constellation of state and local governments, indigenous nations, unincorporated territories ǂ export
p. 500 processing zones, *colonias*, and [other] anomalies ǂ that do not ↳ comprehensively delineate an inside and outside of the nation-state.”[17] Nor is the United States easily contained by its own boundaries, as it “remains reliant on the ever-expanding dispossession and disavowal of indigenous people, global circuits of expropriated labor, economies of racialization, and its expansive network of military bases.”[18]

Precisely because it refers to processes that are so fundamental and so fluctuating, the imperial cannot be reduced to a single meaning. Very broadly, we might use the term to refer, as Kramer suggests, to “a dimension of power in which the asymmetries in the scale of political actions, regimes of spatial ordering, and modes of exceptionalizing difference enable and produce relations of hierarchy, discipline, dispossession, extraction, and exploitation.”[19] Of particular relevance to the study of immigration law are those processes that produce uneven divisions of space and distributions of mobility; practices of social differentiation, not limited to racialization, which predicate and legitimate differential governance; and the expansion and intensification of an insatiable form of capitalist accumulation which feeds on crisis, displacement, and the creation of new markets. Colonial occupation is only one form of imperialism; the “new imperialism” with which the United States has been identified in the twenty-first century is one of unilateralism—the unilateral exercise of economic and military power and influence abroad.[20] Unilateralism, since Chinese Exclusion, also defines modern immigration law.

This chapter consists of three sections. Section 27.1 begins with a discussion of Chinese exclusion, which marks a turning point in the history of modern migration control. While the history of Chinese exclusion may be familiar to students and scholars of immigration law, particularly in the United States, what often remains underappreciated in the telling of that history is the role that the United States, along with other European empire states, played in *stimulating* migration from China before suspending it. While scholarly and public discussion about immigration policy tends to focus on the question of inclusion or exclusion—focusing on the migrant’s sudden arrival at the border—the temporally and spatially expanded framework of the imperial allows us to bring into focus, as Kramer suggests, “empire’s role not only in barring migration but in provoking it through dislocation and selectively promoting, sponsoring, channeling and disciplining migrations in pursuit of labor power, intellectual capital, ideological legitimacy, or … influence.”[21]

Section 27.2, focusing on the exclusion of Indian immigrants from the white settler dominions of Canada, Australia, and South Africa, traces a line of continuity between the imperial regulation of global migration through the late nineteenth century and the emergence of immigration restrictions at the start of the twentieth century. Though the United States is not the focus of this section, by inviting comparison across
p. 501 white ↳ settler contexts, this chapter seeks to challenge the myth of American exceptionalism which preserves the notion that, since its founding, the United States set itself apart from Europe and its illiberal traditions, to establish a political community among uniquely free and equal people. In closing its border to Indian immigrants, the United States rather willingly drew itself into alignment with its counterparts within the British Empire—often through explicit borrowing of legal strategies, sometimes through elicit exchange.

The third and final section of this chapter, 27.3, turns to consider an ethical tension between indigenous communities and racialized newcomers in settler colonial contexts. In the past decade, indigenous scholars have argued that postcolonial and critical race studies have failed to acknowledge the particularity of indigenous experience. In legal discourse, too, the case for expanding opportunities for legal immigration is often articulated in terms of anti-racism, equality, and humanitarian largesse, but in ways that as often fail to acknowledge indigenous priority or sovereignty. The routine erasure of indigenous displacement, indigenous critics argue, allows racialized newcomers to innocent themselves of settler arrangements, even as they seek inclusion within those arrangements, rather than an end to them. But immigrant accountability to indigenous grievance is essential to developing a critical understanding of how settler colonialism continues to simultaneously but separately subordinate indigenous and immigrant subjects, and how, in turn, potential solidarity among minoritized communities within the nation state might redress the still-unfolding history of imperialism.

27.1 Chinese Migration and the Globalization of National Borders

In the decades before it closed its doors to Chinese migrants in 1880, the United States joined the rush of European empire states aggressively campaigning to open a reluctant China to foreign trade and emigration.[22] By the late eighteenth century, European demand for Chinese silk, porcelain, and tea had created an imbalance of trade, resulting in the flow of hard currency, silver, out of Europe and into China, where it tended to remain because Chinese consumers had little demand for European goods. Eager to level the imbalance, European traders aggressively promoted the one import for which they noticed a growing demand in China—opium. In the 1790s, the British East India Company began to import larger quantities of opium from Bengal and into China, establishing a highly lucrative if somewhat unstable triangular trade. Gradually, the Company opened the Chinese opium market to a vast network of British, Dutch, Portuguese, p. 502 and American traders, shipping companies, and investment bankers who ↳ profited richly from the opium trade, though it was illegal, devastating to Chinese society, and morally outrageous even to most Europeans.[23]

In the 1830s, after rejecting British proposals to legalize the drug and passing numerous edicts to prohibit various aspects of its trade, the Chinese government finally appealed to the British government to restrain its own traders.[24] In an open letter to Queen Victoria, the Chinese government, through one of its officials, asked why so many traders had come all the way to China to compete to sell their “poisonous drug.” Observing that opium was banned in Britain, the Chinese official asked why Britain would allow a harm prohibited in its own country to be passed on into another.[25] Disappointed by the Queen’s lack of response, in 1839, the Chinese government ordered the seizure and destruction of opium stored in British warehouses—roughly 120 tons, worth tens of millions of British pounds. The British government responded by dispatching its navy, bombarding cities up and down the coast of China, killing thousands of soldiers and civilians. The First Opium War was concluded by signing the first of what Chinese refer to as the “unequal treaties.” China was forced to cede the island of Hong Kong, open five ports to foreign trade, remove existing barriers to emigration, and pay reparations in silver.[26]

China had long restricted emigration, but the opening of treaty ports to foreign entrepreneurs, including labor recruiters, would allow an emerging coolie trade to flourish. Since the abolition of the transatlantic slave trade, in 1807, colonial planters in Southeast Asia and the Caribbean were eager to find alternative sources of cheap labor. With the opening of China’s treaty ports in the 1840s, British and American entrepreneurs began to organize the mass transport of Chinese laborers across the Pacific to the United States, Canada, Peru, and Australia.[27]

Chinese migration at the time consisted mainly of two types: “coolie” or contract laborers, who by force or deception were transported to colonial plantations where they lived and worked under grueling conditions often compared to those of slavery, and “free” migrants, who were considered “free” because they “command their own labor,” if only by entering into arrangements that bound them to brokers and creditors.[28] As Moon-Ho Jung demonstrates, in the late nineteenth century, public perceptions of Chinese migration—and the moving distinction between coerced and free migration—had been shaped by p. 503 contemporary debates about slavery and its abolition.[29] After reports ↳ of the horrific mistreatment of Chinese laborers in Cuba reached the United States, many Americans called for an abolition of the coolie trade, comparing it to slavery. In 1858, Southern planters joined the chorus, calling on Congress to condemn the coolie trade not only "as a matter of humanity and policy" but also because they feared competition from British and French planters in the Caribbean.[30] Indian and Chinese coolies were evidently cheaper to exploit than enslaved Africans. In 1862, the US Congress finally passed a law prohibiting American vessels from participating in the notorious "coolie trade" but otherwise left undisturbed the flow of voluntary migrants from China.[31] Only a few years later, the federal government would sign a treaty with China to further expand the flow of Chinese laborers.

But while the US government allowed and even encouraged migration from China, Chinese migrants themselves had begun to find themselves unwelcome in California. White settler communities across the Pacific had begun to enact laws intended to frustrate Chinese settlement—early experiments in immigration control. In 1852, California imposed a tax on foreign miners, enforced primarily against Chinese gold miners. In 1855, the Australian colony of Victoria restricted Chinese laborers to segregated camps, later imposing an annual residence fee.[32] British Columbia later disenfranchised Chinese and indigenous peoples.

In the United States as in the British dominions, anti-Chinese laws were generally struck down because they were plainly at odds with the free trade imperatives promoted by the American and British governments. By the 1860s, after the Second Opium War, the British Empire, joined by the French and Russian empires, signed the Treaty of Beijing, forcing China to open another eighty ports to trade and emigration.[33] A few years later, the United States and China (represented by an American ambassador) signed the Burlingame Treaty, in which both countries acknowledged "the mutual advantage of free migration" and affirmed "the inherent and inalienable right of man to change his home and allegiance."[34] The treaty, which promised Chinese nationals the freedom to migrate but with no corresponding right to naturalize, was designed to encourage what was imagined to be a flow of temporary laborers—guestworkers.

Chinese migration thus opened a divide between frontier settlements and the centers of government, one that eventually led to the federalization, or nationalization, of immigration control in the white settler world. In the United States, a regional panic set off an international crisis which, in turn, forced the federal government to take up the immigration question as a matter of national concern.[35] After decades of refusing p. 504 the demands of exclusionists on the West Coast, in 1882, the US Congress took the extraordinary step ↳ of suspending the immigration of all Chinese "laborers" for a period of ten years. The law did not establish an absolute or indefinite ban—that would come a decade later. In the meantime, to preserve diplomatic relations and honor international norms, the law allowed "non-laborers" (diplomats, students, businessmen, etc.) and returning residents to enter the country with government-issued certificates.[36] Two years later, Congress amended the law, tightening certification requirements for non-"laborers" and returning residents.[37]

Neither the law nor the amendment seemed to placate exclusionists on the West Coast; to the contrary, the legislation seemed only to fuel resentment, which exploded into violence across the northwestern United States—and Canada.[38] Between 1885 and 1888, organized mobs in nearly forty cities descended upon Chinese communities, forcing individuals from their homes, robbing them of their possessions, and setting fire to their businesses. Far from spontaneous outbursts, the attacks were planned and coordinated. A successful campaign to drive the Chinese community out of Tacoma, Washington, was referred to as the "Tacoma Method" and held up as an example to other cities intent on "driving out" unwelcome foreigners.[39]

In one of the most violent campaigns, in Rock Springs, Wyoming, in 1885, white miners killed and mutilated twenty-eight Chinese workers. The attacks were aimed as much at driving out Chinese immigrants—by force and by terror—as they were at sending a message to congressmen on the opposite side of the country.[40] Successive amendments to the Chinese Exclusion Act went far beyond restricting new migration: the Scott Act of 1888 prohibited the entry of even returning residents, effectively voiding residence and reentry certificates; the Geary Act of 1892 extended the original ban for another decade and required that all Chinese immigrants, including long-time residents, register for certificates of residence proving their right to remain in the United States.[41]

The Geary Act was enormously important to the development of the United States immigration bureaucracy in that it effectively established an internal passport system, the purpose of which was not only to surveil and control the movements of Chinese immigrants but to establish a legal framework for their criminalization and eventual expulsion: unless they could produce a certificate or other evidence proving that they had a right to remain, Chinese immigrants were presumed to be "illegal." This was the first time that unauthorized presence in the United States was considered a federal crime. But as important, the law transformed the meaning of place and presence, formalizing nativist projections of who did and did not belong in the United States. As one sympathetic observer noted, under the law, "all Chinese are treated as p. 505 suspects if ↳ not criminals."[42] And whiteness, in turn, would become the naturalized embodiment of national belonging.

In a series of cases often referred to as the *Chinese Exclusion Cases*, the Supreme Court upheld congressional attempts to restrict Chinese migration. In 1889, Chae Chan Ping, a returning resident denied entry under the Scott Act, argued that the provisions of the law violated the terms of the Burlingame Treaty. The Court acknowledged as much but went on to explain that Congress was not bound by the terms of the treaty, nor could it waive—by treaty or otherwise—its "exclusive and absolute power" to exclude foreigners from the United States. Announcing what is often called the plenary power doctrine, the Court explained that the power to exclude foreigners was a power inherent to territorial sovereignty:

> That the government, through its legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.[43]

Since the 1840s, the federal government had played an essential role in securing a steady flow of cheap labor from China; now, however, the Supreme Court characterized the same flow as an "invasion," the work of Oriental cunning. Conflating immigration with foreign invasion, the Court furnished the emergent plenary power doctrine with what has proven to be an especially durable rationale for immigrant exclusion—national security.[44]

Though it is sometimes represented as an embarrassing aberration in the history of the United States, this nation of immigrants, the arrival of Chinese immigrants in the late nineteenth century played a critical role in transforming modern immigration law. The Supreme Court developed a legal rationale for restricting migration, transforming what had long been recognized as the natural right to free movement into a problem over which national governments would exercise exclusive control. Chinese migration not only gave rise to new formulations of national sovereignty—formulations that were quickly adopted around the world—it also transformed popular conceptions of the nation's land borders. Before Chinese exclusion, immigration was focused at United States seaports, where immigrants were generally welcomed. After Chinese exclusion, immigrants began to enter the United States through its southern and northern borders.[45] The smuggling routes paved by Chinese migrants in the late nineteenth century were later followed by Greeks, Italians, and other later excluded groups. Chinese exclusion also initiated what Erika p. 506 Lee has described as a "domino effect," where the closing of one ↳ border prompted the closing of every other.[46] As Chinese immigrants began to enter the United States through Mexico and Canada, those countries eventually adopted restrictive immigration laws. Similarly, in Australia, soon after Victoria imposed a landing tax and tonnage limit, Chinese migrants began to circumvent regulation by entering through nearby ports in South Australia and New South Wales—until those colonies adopted similarly restrictive immigration policies.[47]

In Australia and later Canada, Asian migration thus provided motivation both to coordinate a regional response and to secure from London greater autonomy and, eventually, dominion rule. Just as Chinese migration prompted the nationalization of immigration control in the United States, Asian migration played an essential role in transforming white settler colonies into self-governing dominions, and eventually independent nation states.

27.2 Continuous Journeys: From Intra-imperial to International Control

In the spring of 1914, a ship carrying some three hundred Indian immigrants across the Pacific Ocean, from Calcutta to Vancouver, set off a crisis within the British Empire.[48] Canadian officials had recently enacted a law that would prevent the ship's passengers from landing. The passengers themselves were determined to challenge the law, arguing, "we are British citizens … [W]e have the right to visit any part of the Empire."[49]

When a few thousand Indian laborers began immigrating to Canada in 1906, there was little precedent for excluding them. Existing laws regulating British emigration were primarily intended to relieve "the pressures of over-population and consequent over-competition" in England and to encourage population growth and settlement in the colonies.[50] And while the British government regulated the transfer of coolie laborers from India to colonial outposts around the world, they were careful to avoid imposing unprecedented restrictions on the movement of "free" people. Throughout the transatlantic world, the emerging coolie trade drew criticism from activists who compared it to the abolished slave trade—pointing to practices of kidnapping, deception, and deadly working conditions. Defenders of the coolie trade argued that restrictions on the rights to movement and contract were without legal precedent and contrary to p. 507 British ideals.[51] ↳ Carefully navigating the imperatives of human freedom and free trade, the British government gradually came to supervise the coolie trade. The restrictions on migration set forth in the Indian Emigration Act of 1883 established a state-supervised system to monitor the treatment of coolies, but avoided interference with the "free migration" of the few Indians who moved across the British Empire independently of state supervision. Nor did it establish any right to restrict the *immigration* of Indian subjects traveling within the British Empire.[52]

Moreover, attempts to restrict Indian immigration to Canada exposed an untenable asymmetry within the British imperial system. In the second half of the nineteenth century, the white settler dominions of Canada, South Africa, Australia, and New Zealand had all been granted greater rights to self-government. But India, after a bloody bid for independence, was denied the same privilege. Instead, in 1858, India was transferred from company to Crown rule. The same year, Queen Victoria issued a Proclamation declaring that "we hold ourselves bound to the natives of our Indian territories by the same obligations of duty which bind us to our other subjects."[53] Though denied the same rights to self-government extended to the white settler dominions, Indians were guaranteed "equal and impartial protection" within the British Empire. Indian immigration to Canada thus confronted the British government with a crisis: Canadian officials argued that their right to self-government amounted to little if they could not exclude foreigners, including unwelcome Indians. Indians, on the other hand, argued that they had the same rights to travel within the empire as any other British subject. As one observer wrote, Indian immigration to Canada presented the imperial government with a test: "There will be either one standard, or two, within the Empire of British subjects, interests and privileges. If the latter, then it must be based on race privileges or race superiority. Hence, India is looking to Canada most anxiously as to her own present and future status."[54]

To avoid the charge of racial discrimination, officials in London tolerated forms of immigration restriction that would allow the white settler dominions to prevent an influx of unwelcome "aliens" but without offending "the traditions of the Empire, which make no distinction in favor of, or against, race or color."[55] Instead of race or color, Colonial Secretary Joseph Chamberlain suggested, exclusionists might appeal to cultural differences or moral deficiency. "It is not because a man is of a different color from ourselves that he is necessarily an undesirable immigrant, but because he is dirty, or he is immoral, or he is a pauper or he has some other objection which can be defined by an Act of Parliament."[56] In 1896, officials in the colony of Natal (contemporary South Africa) adopted a literacy test, modeled after literacy tests adopted in the American South to p. 508 ↳ disenfranchise black voters.[57] The literacy test adopted in Natal, so that it would "meet the requirements of Natal in connection with India," excluded immigrants who were unable to read or write in a European language.[58] A few years later, in one of its first acts of legislation as a new Commonwealth, Australia enacted a similar test, for the purpose of excluding immigrants from all of Asia.[59]

Indians throughout the empire of course saw through these strategies of racial exclusion. Mohandas Gandhi, for instance, responded to the Natal legislation with incredulity, insisting that the literacy test "was passed with the deliberate intention of applying *almost exclusively* to the Indians."[60] As Gandhi and others became increasingly disenchanted with the government's dissembling, they began to revise their political ambitions. Losing faith in the promise of imperial citizenship, they began to agitate for national independence. By the time Canada sought to exclude immigration from India, British officials conveyed that they would allow some form of restriction but worried that a literacy test like the one adopted in Natal would no longer be acceptable, given the way it had inflamed nationalists on three continents, almost immediately globalizing a growing movement for national independence.

As Radhika Mongia has shown, Canadian officials scrambled to find an alternative rationale for exclusion, attempting to stretch an available humanitarian rationale to suggest that Indians had "doubtless come under misrepresentation" about the climate, for which they were plainly unsuitable, or employment opportunities, the lack of which would render Indians liable to become public charges.[61] Eventually, in 1908, Canadian officials adopted an order-in-council that limited entry to those who "come from their country of birth or citizenship by continuous journey."[62] The "continuous journey" restriction, as it came to be known, effectively excluded everyone traveling from India, since, at the time, there was no direct transit from India to Canada. The special brilliance of the restriction was not only that it excluded Indians without naming them but that it effectively blocked the small but especially despised minority of "remigrants," laborers who had completed their terms of indenture in other parts of the empire. The "continuous journey" restriction, in combination with a substantial entry fee, effectively put an end to Indian immigration from India. In 1908, a few thousand Indian immigrants entered the country; between 1908 and 1913, only a handful of Indian immigrants entered the country—all of these as returning residents.[63]

But the arrival of Indians aboard the *Komagata Maru*, demanding equal rights to movement and entry, prompted officials in Canada to assert more aggressively that p. 509 ↳ national independence required control over borders and the entry of new immigrants. Frank Oliver, Minister of the Interior, reframed the policy of Hindu exclusion in terms of national sovereignty:

> The immigration law as it stands is a declaration on the part of this country that Canada is a mistress of her own house and takes the authority and responsibility of deciding who shall be admitted to citizenship and the privileges and rights of citizenship within her borders. This is not a labour question; it is not a racial question; it is a question of *national dominance* and *national existence*. The *Komagata Maru* incident is an organized movement for the purpose of establishing as

> a principle the right that the people of India, and not the people of Canada, shall have the say as to who may be accepted as citizens of Canada.[64]

The outbreak of world war and intensification of decolonization movements perhaps lent credibility to the claim that radicalized Indians threatened “national existence.” And the claim that control over migration is an essential feature of national independence directly echoes pronouncements made by the US Supreme Court in the *Chinese Exclusion Cases*.

But the Indians aboard the *Komagata Maru* did not come as foreign enemies. Instead, they came as British subjects testing guarantees of equal treatment. Lala Lajpat Rai, a leader of the Indian decolonization movement, exiled in the United States at the time, wrote of the incident, “a shipful of Indians is not, superficially, a matter of much importance, and yet,” he anticipated, it would be remembered by historians, as “the most significant thing to be seen in the world today”: “it is a challenge thrown down, not only to the British Empire, but to the claim of the white man to possess the earth.”[65] British imperialism consisted of deciding who belonged where: “everywhere the white man proceeded upon the assumption that he was born to possess the earth and that the coloured man was born to be his hewer of wood and drawer of water, used if he needed him and thrown aside if he did not.”[66] And he recognized the sudden closing of New World borders to be entirely consistent with the spatial economy of empire, designed to expropriate labor and land from racialized peoples to enrich white spaces. As he explained, the British Empire “will not allow the coloured man to make his home within its borders. It does this on the most frankly *material* ground.”[67]

Around the same time, W. E. B. Du Bois took note of a new race-consciousness sweeping the globe. “The world in a sudden, emotional conversion has discovered that it was white and by that token, wonderful!”[68] This “discovery of personal whiteness” in Du Bois’s account, was a response to what an American eugenicist referred to alarmingly as the “rising tide of color”—the uprising of colonized peoples and the advent of raced migration, or the migration of racialized peoples to white nations. “Wave upon wave,” ↳ Du Bois continued, “with increasing virulence, is dashing this new religion of whiteness on the shores of our time.” Redeploying the imagery often associated with Asian migration—waves and tides, fear of invasion and inundation—Du Bois recognized the important role that Asian migration had played in both creating a transnational white identity and in precipitating nation state borders.

As Rai and his contemporaries anticipated more than a century ago, the closing of New World borders and the proliferation of immigration controls would play an important role in preserving the asymmetries of imperialism, long after the dissolution of formal empire states. National boundaries would provide a spatial solution to the problem that decolonization might have otherwise unleashed—the free movement of colonized peoples. By the late twentieth century, when peoples from the colonized world finally gained their independence—in the limited form of territorial sovereignty—they had already lost the freedom of movement, that fundamental “right of man” long enjoyed by Europeans and their descendants in the white settler world.

27.3 Immigration, Indigeneity, and Reciprocity

In January 2017, US President Donald Trump signed an executive order authorizing the construction of a wall along the southern border of the United States. The proposed wall would run through the ancestral lands of the Tohono O’odham peoples, bisecting their reservation, which straddles the US-Mexico border. Henry Jose, a US Navy veteran, explained that he and his family used to go back and forth freely to visit their ancestors’ graves. “Our roots are here. Our roots are there too. The border means not a thing to me. The border is between the white people and the Mexicans but not us O’odham. These are Indian lands, O’odham lands.”[69]

The Tohono O'odham have lived in the Sonoran Desert for thousands of years, long before European settlers arrived. After the Mexican-American War, in 1848, the international boundary between Mexico and the United States was drawn at the Gila River, just north of O'odham lands. But with the Gadsden Purchase of 1854, the United States acquired lands south of the Gila River, redrawing the boundary between the United States and Mexico such that it divided O'odham land and peoples. According to the terms of the purchase, O'odham living in Arizona would become US citizens; those living in Mexico would not. The O'odham themselves were never consulted about the division. Initially, the purchase had little effect on the O'odham, p. 511 who continued to move freely ↳ across their ancestral lands, but they gradually lost territory on both sides of the border to settlement, mining, and railroad construction.[70]

In more recent years, border enforcement has become increasingly disruptive to the O'odham community. According to a tribal resolution passed in 1998, border enforcement "has made it extremely difficult for all Tohono O'odham to [exercise] their sovereign right to pass and re-pass the US-Mexico border as we have done for centuries as our members are routinely stopped by US Border Patrol, while others have been actually 'returned' to Mexico, though enrolled."[71] Tribal leaders describe the border as an artificial barrier to their natural freedom to their lands, to visit family members and ancestral sites, to collect water and materials needed to sustain their culture. The O'odham have also been forced to suffer the consequences of border militarization. Beginning in the early 1990s, heightened border enforcement in popular crossing areas like Tijuana-San Diego and Juarez-El Paso has channeled unauthorized migration and drug trafficking over their reservation. Increasingly, that migration and drug trafficking is controlled by violent cartels. A number of tribal members have been lured into working as coyotes or mules for the Mexican cartels, ending up in jail themselves. Tribal leadership has otherwise cooperated with US Customs and Border Patrol.[72]

The tribe now has 34,000 enrolled members. Half live on the reservation in Arizona; 2,000 live across the international border in Mexico; the rest have left, feeling there is little future for them on the reservation. O'odham members fear that President Trump's border wall threatens not only to divide their remaining community but to sever its relationship with the land. The tribe has survived the cleaving of its land for more than 150 years, but many view the president's proposed wall as a final indignity. To a reporter, one tribal member explained, "There is no O'odham word for wall."[73] The wall itself, of course, is intended to deter, among others, women and children fleeing violence in Central America. They are not "illegal"; they seek asylum under the law. Many of these migrants have been displaced by economic policies and military conflicts in which the United States has been directly involved. Many of them are themselves indigenous to a continent divided by conquerors.

Though President Trump has insisted that "Mexico will pay" for the proposed border wall, in 2018, a group of Indian immigrant organizations announced that they would volunteer to pay for it. These organizations represent the interests of the recent wave of Indian immigrants who came to the United States as tech workers through the H-1B visa program.[74] The program allows US employers to sponsor "high-skilled" or p. 512 specialized ↳ workers who are generally paid far less than their American counterparts. Because H-1B visa holders are bound to their sponsors, many are eager to apply for green cards, which confer permanent resident status and greater economic mobility, as well as mobility for their spouses and children.[75] But given the current backlog of visa applications, Indian nationals living within and outside the United States, even if approved, would have to wait fifty to seventy years before obtaining a green card.[76]

To improve their status, several Indian immigrant organizations have aligned themselves with white nationalists who advocate building a border wall, limiting "chain migration," and eliminating the "unfair lottery system" which primarily benefits immigrants from what President Trump has called "shithole countries."[77] These organizations recommend eliminating visa categories that benefit more vulnerable immigrant groups in order to expand opportunities for relatively privileged immigrant groups—high-skilled workers who, as they propose, are willing to pay higher fees which, in turn, would cover the costs of building a wall. As Aman Kapoor, co-founder of Immigration Voice, explained in a press release, “this is a win-win for everybody, it allows President Trump to fulfill his campaign promises to build a wall that is not paid for by American citizens and † it would help to grow our economy by allowing highly skilled immigrants to start their own companies and hire American workers.”[78]

The erasure of indigenous presence, a practice constitutive of settler ideology and often extended by new immigrants, has become the focus of sustained critique among indigenous scholars.[79] Several years ago, Canadian scholars Bonita Lawrence and Enakshi Dua published a provocative essay arguing that scholars of the postcolonial diaspora, even as they advance searching critiques of colonialism and its legacies, consistently fail to acknowledge the particularity of indigenous dispossession. Similarly, they argue, critical race scholars, by adopting an anti-racist or anti-discrimination framework, tend to flatten the differences between various racialized groups, drawing false equivalences among them. Indigenous peoples are not merely victims of racism, Lawrence and Dua insist, they remain subject to “ongoing colonization.” Moreover, they charge, the continued failure to recognize and to challenge ongoing colonization renders scholars and activists complicit with settler colonialism.[80]

Indifference toward indigenous displacement, these critics argue, allows racialized newcomers to imagine themselves to be innocent of settler arrangements—even as they seek to be included within those arrangements. Racialized newcomers, though they may be subject to discrimination and hardship, as many p. 513 H1-B visa holders are, do not ↳ arrive at a blank slate. Instead, they find themselves in a place that is at once stolen lands, a plantation colony, a carceral state. They cannot ignore “the complex relationship people of color have with settler projects. Although marginalized, at particular moments they have been complicit with ongoing land theft and colonial domination of Aboriginal peoples.”[81] Racialized immigrants who assert their qualification for green cards or citizenship in terms of their assimilability or productivity invariably rearticulate, rather than disarticulate, the terms of liberal capitalism on which the settler nation is founded; they implicitly or explicitly distinguish themselves from less deserving others. Chickasaw scholar Jodi Byrd has argued that immigrant indifference to their complicity with settler ideologies perpetuates the “historical fantasy of settler states evolving into multicultural nations.”[82] She and others remind us to remain vigilant about the ways in which appeals to multiculturalism, or the United States’ self-image as a “nation of immigrants,” tends to legitimate and extend settler imperialism. Dean Itsuji Saranillio suggests that the “multicultural” variant of settler colonialism is distinguishable from an earlier “white settler colonialism” only in that it uses brown bodies “to further consolidate U.S. settler and imperial hegemony.”[83]

These critiques, which bring into focus an uncomfortable tension between claims to indigenous sovereignty, on the one hand, and immigrant inclusion, on the other, have generated conflicting responses. Some have expressed doubt about the analytical use or adequacy of “conflating” processes of migration with colonization, but most others have responded to the indigenous call for immigrant accountability by acknowledging both its ethical urgency and conceptual provocation.[84] The provocation is not, as Saranillio put it, “to argue over who is and is not a settler” but, instead, to develop a critical understanding of how settler colonialism continues to proliferate forms of difference, giving rise to multiplicities of competing injury.[85] For instance, the assumption that the United States can “legalize” undocumented children only if it builds walls to prevent more from coming, or the assumption that the United States can admit skilled workers from Asia only if it limits “chain migration” from Central America—these assumptions, which have come to organize debates about immigration reform, reflect the narrow imperatives of a multicultural neoliberalism that embraces difference only in the service of economic expansion.

Observing that the study of racialized minorities is often framed in terms of their vertical relationship to a national white majority, Françoise Lionnet and Shu-mei Shih advocate a model of comparative study that p. 514 situates minorities in horizontal relation ↳ with one another. Within multicultural societies, the liberal narrative of progress is one in which a succession of minoritized groups—black, immigrant, indigenous—

travel separate but parallel paths to citizenship and inclusion. Even more critical accounts of racial formation, they argue, tend to reproduce binaries of white and non-white, inside and out, above and below. Both the liberal and critical accounts of minority experience end up reinscribing the universality of the liberal nation state and the essential particularity of its racialized minorities. "What is lacking," Lionnet and Shih argue, "is an awareness and recognition of the creative interventions that minoritized cultures produce within and across national boundaries."[86] Similarly, Lisa Lowe, in her study of "colonial intimacy"—the imposed relation among peoples across continents with the advent of colonialism—argues that the collective work of dismantling colonial structures requires attention to "*relation* across differences rather than equivalences, on the convergence of asymmetries rather than the imperatives of identity."[87]

I want to conclude with an illustration of such horizontal and relational engagement between indigenous peoples and immigrants. In 2010, a boat carrying 255 Sri Lankan Tamils heading for Australia's Christmas Island were, at the request of the Australian Prime Minister, intercepted by the Indonesian government and escorted to the port of Merak, at the northwestern tip of Java. For more than six months, the passengers, dreading indefinite detention in Australia's notorious offshore sites, refused to disembark until they had been assured passage to Australia. The Australian government refused, but Aboriginal Australians responded by producing Original Nation Passports for the asylum seekers. At a rally in support of the asylum seekers, Aboriginal activist Robbie Thorpe stood in front of a government building in Melbourne and announced, "We want to make it clear that the Aboriginal people, the true sovereigns of this land, are offering them a passport to enter into our territorial waters, and our land," adding "we're the colonized refugees."[88]

Aboriginal self-identification as "refugee" is simultaneously a disavowal of Australian identity and expression of allegiance with asylum seekers. Aboriginal peoples share with asylum seekers histories of displacement and confinement at the hands of coercive sovereign powers. As some have pointed out, many of the asylum seekers subject to especially brutal forms of detention have been uprooted by wars led by United States, British, and Australian militaries.[89] And asylum seekers are not the first non-citizens subject p. 515 to administrative detention in Australia: Aboriginals were detained to prevent their entry ↳ into territories designated for white settlers.[90] Indigenous activists in the United States have similarly expressed solidarity with undocumented immigrants, recalling their own communities' vexed relationship to citizenship and documentation. Indigenous Americans were not extended birthright citizenship until 1924; until then, they were required to carry documents when leaving their reservations.[91] Citizenship remains a vexed status for indigenous Americans in that it disavows indigenous sovereignty and has historically been part of a strategy of assimilation and elimination.[92]

Emma Cox, in her remarkable study of aboriginal and immigrant activism in Australia, observes that while Aboriginal gestures of welcome toward asylum seekers invite solidarity among the nation's outcasts, these are not uncomplicated forms of identification. Passport ceremonies, for instance, assert the priority of indigenous peoples to determine who is welcome, usurping the national government of its claim "to decide who comes to this country and the circumstances in which they come" as John Howard announced at the beginning of his 2001 election campaign.[93] But at the same time, the gesture eschews any false equivalence between Aboriginals and asylum seekers, who some Aboriginal activists worry are often perceived as the more deserving victim, turning limited sympathy and attention away from Aboriginal concerns. Aboriginal activists' recourse to analogy—comparing themselves to refugees and prisoners—indexes the challenge of representing the indigenous experience on its own terms. Aboriginal scholar Irene Watson, like many others, opposes Australia's policy of detaining asylum seekers but worries that "it is the detention of Aboriginal peoples in this country we have turned our gaze from; a much more deserving victim has emerged, along with another human rights struggle."[94]

Aboriginal gestures of welcome to unauthorized migrants posit a common ground for developing alliances among displaced communities, but more importantly, they also pose a challenge to the legitimacy of settler sovereignty and point toward an alternative framework for addressing questions about rights, responsibility, and human movement. In the words of indigenous poet Tony Birch, "our legitimacy does not lie within the legal system and is not dependent on state recognition … [w]e need to claim and legitimate our authority by speaking out for, and protecting the rights of others, who live in, or visit *our* country."[95] For Gungalidda elder, Wadjularbinna Nulyarimma, also asserting the "refugees were coming here, to OUR country, which we as Aboriginal people have a spiritual ↳ connection to," the assertion of a right and responsibility to welcome others is articulated not in terms of a unilateral right but reciprocal duty:

> This is a spiritual country and we are a spiritual people, we are ready to embrace other people in their need. We should only be using the things we need to survive, and not keeping everything for ourselves, and living well at other people's expense. Before Europeans came here, (illegally), in the Aboriginal world, we were all different, speaking different languages, but we all had the same kinship system for human beings … everyone is part of us and we should care about them. We can't separate ourselves from other human beings—it's a duty.[96]

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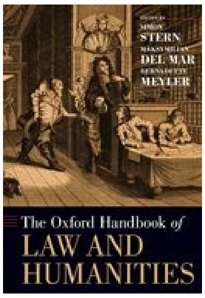

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CHAPTER

28 Indigenous Law

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Abstract

Indigenous law is the category applied to the norms and legally binding practices of thousands of distinct indigenous communities spanning six continents. This chapter focuses on the content and construction of indigenous law within the borders of the present-day United States, equally marked by diversity among Native communities. Nonetheless, it identifies several important ways in which indigenous law broadly construed diverges from Euro-American legal systems. The chapter notes that indigenous communities have not drawn sharp distinctions between law and other methods for maintaining the proper ordering of society. And, while cautioning against essential accounts of Native justice, it also observes the ways in which Native dispute resolution focuses more on community and restoration than Anglo-American adversarial models. The chapter also recounts constructions of indigenous law by North America's would-be European colonizers. It describes the long-standing practice by many colonizers of describing indigenous peoples as lawless. This language, the chapter argues, did important work in justifying colonization and the imposition of Anglo-American law. But it also traces the ways in which Native peoples forced Anglo-Americans to incorporate indigenous laws into US law. This incorporation happened both informally—as Anglo-Americans negotiating with Native nations adopted their rules to govern negotiations—and formally, as the body of law known as federal Indian law created a regime of legal pluralism that granted limited recognition to Native nations' assertions of jurisdiction. The chapter concludes by noting the dangers of adopting the colonizers' frame and defining indigenous law principally as a foil for Anglo-American law.

Keywords: law and colonialism, legal history, law and anthropology, Native/indigenous peoples, jurisprudence

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28.1 Introduction

INDIGENOUS law is a fraught concept. For one, it is not an indigenous category. Although many indigenous groups recount being rooted in a particular place since time immemorial, the concept of indigeneity only became comprehensible after the advent of settler colonialism and the arrival of non-Native outsiders. For the vast majority of the people labeled both historically and currently as "indigenous," their primary identities have derived from belonging within highly localized communities and polities: villages, clans, religious and linguistic groups, and the complex and often decentralized governance structures that Europeans labeled tribes and nations. "Indigenous law" flattens and obscures this incredible diversity: it is, in practice, the comparative law of thousands of distinct peoples stretched across six continents. Even within the present-day United States, on which this chapter focuses for the sake of coherence and scope, the federal government recognizes 573 "Indian entities"; there are also many other federally unrecognized indigenous groups, including tens of thousands of Native Hawaiians.

Law presents its own difficulties. Defining law, and distinguishing it from other kinds of rules, has been the foundational question for nearly all Euro-American humanistic and social scientific scholarship on law and politics, stretching from Hobbes and Locke through Weber and Durkheim up to Rawls and Hart and beyond. Efforts to slot indigenous practices into these canonical definitions have long prompted interminable debates over whether indigenous law is really *law* in some fundamental sense. Yet, as this chapter explores, the mischaracterization, misrepresentation, and misunderstanding of indigenous societies, cultures, and orderings—in particular, the refusal to recognize them as *law*—has long had grave consequences for these communities and served to further colonialism.

p. 518 Rather than attempt to solve these challenges, we rely on our collective expertise in law, anthropology, and history to offer some tentative thoughts about the broad-gauge features of indigenous law, in particular how it differs in important ways from some common aspects of Euro-American legal systems. We also explore how the creators of the category of indigenous law, European colonizers, constructed it, simultaneously denying its existence and yet formally and informally recognizing Native law within their legal regimes.

28.2 Contours of Indigenous Law

Indigenous law lacks the sharp divide between "law" and other methods for ensuring the proper ordering of society characteristic of Western jurisprudence. Indigenous law draws from multiple sources, is adjudicated in diverse fora, and has continued to grow and develop, including through the encounter with Western models of adversarial legalism.

28.2.1 Sources of Law and Authority

In other writings, two of us described all legal systems as invariably made up of some combination of social institutions (relatively stable sociocultural phenomena like family units, religious orders, or bureaucracies), social practices (dynamic processes that constitute the everyday work of social institutions—family dinner gatherings, ceremonial rites of passage, or regulatory hearings), and the norms that guide, or ought to guide, the execution of those practices and the efficacy of those institutions. Of course, this definition of law as the interface of some set of social institutions, practices, and norms is so broad that it does not distinguish “law” from other domains of social life; indeed, the examples we just gave draw equally on the domains of familial life and theology as they do on governance. But this is precisely the point. The dichotomy between “law” and less formalized “norms” or “customs” is a feature of Western, not indigenous, jurisprudence.[1]

Evidence from close ethnographic engagement with indigenous communities demonstrates the significance of this capacious understanding of law. Take, for example, the Hopi Tribe located in northeastern Arizona, where Justin Richland has worked as a scholar, advocate, and judge for nearly twenty-five years. Prior to 1936, nothing like a Hopi Tribe existed. Instead, the people who called themselves Hopi lived in one of twelve autonomous pueblos located on and around three mesas that extend from the Southern Rim of the Colorado Plateau. More importantly from their perspective, they were members of kin-based matrilineal groups they called *ngyam*, or clans, and each village was composed of multiple clans, and it was these clans that ↳ were considered the primary authority for controlling access to farming land and housing sites, for regulating marriage relations, and, perhaps most importantly, for playing a part in the ceremonial obligations that bound the villages together.

Anthropologists have variously described the historic system of Hopi governance as decentralized, politically “acephalous” societies, but the Hopi themselves describe it differently. Emory Sekaquaptewa, who was the first Hopi to hold a degree in law, and served as Chief Justice of the Hopi Appellate Court until his death in 2008, described the general ethos of Hopi society as “cooperation without submission.” That is, insofar as it was not villages, but clans, which served as the basic unit of social order at Hopi, it was the responsibility of each clan’s ceremonial and religious leaders (usually a woman and her brother) to regulate social relations, resource distribution, and the overall welfare of their (matrilineally) related clan members. At the same time, it is a general norm at Hopi that members of the same clan cannot marry each other; clan leaders would often have to meet with the leaders of other clans to negotiate relations of marriage (and the economic rights and obligations that went with it) between their betrothed members. It was also the case that while religious ceremonies were considered the sole cultural property of the clans believed to have introduced them to the village community many generations earlier, their proper performance required the participation of members of other clans. The coordination of the inter-clan rights and responsibilities that go along with marriage and ceremonial performance and the regulation of disputes that occasionally arise in those contexts necessarily involve an ethos of “cooperation without submission” that continues among the Hopi to this day.[2]

28.2.2 Dispute Resolution

The traditional legal structures and mechanisms for resolving disputes in indigenous cultures are as varied as the cultures themselves, but several tribal jurists and scholars have described some important general distinctions between Anglo-American legal structures (courts) and indigenous legal structures. For example, renowned former Navajo Chief Justice Robert Yazzie has explored the major structural differences between Navajo dispute resolution and Anglo-American dispute resolution. He characterizes Navajo dispute resolution structures as "horizontal" in contrast to the adversarial Anglo-American model, characterized as "vertical." In a horizontal system (such as a traditional Navajo Peacemaking session), all parties to the dispute resolution are treated as equal. There is no one person in the session who has authority over anyone else. This, of course, can be contrasted with Anglo-American dispute resolution which operates within a p. 520 strict hierarchy—the judge on top as the most powerful, and the clients or the ↳ public on the lowest level. Yazzie argues that a horizontal system is more likely to result in a communal solution that has significance and meaning to all involved.[3]

Melton also distinguishes between the American paradigm of justice and the indigenous paradigm of justice. She writes, "The American paradigm has its roots in the world view of Europeans and is based on a retributive philosophy that is hierarchical, adversarial, punitive, and guided by codified laws and written rules, procedures, and guidelines. … The indigenous justice paradigm is based on a holistic philosophy and the world view of the aboriginal inhabitants of North America. These systems are guided by the unwritten customary laws, traditions, and practices that are learned primarily by example and through the oral teachings of tribal elders." While we should be cautious about essentialist descriptions of tribal dispute resolution, general distinctions between Anglo-American dispute resolution and indigenous dispute resolution concern the methodology and principles underlying conflict and compromise. Traditional indigenous dispute resolution systems did not operate with adversarial principles but rather collective decision-making principles. Indigenous dispute resolution also does not typically seek to have one winner and one loser in the outcome of the dispute. Instead, the goal is to develop a restorative solution that will repair relationships and resolve the problem by cultivating community "buy-in" that is accessible to all concerned parties.[4]

The key distinction between the two paradigms also lies within the decision-making procedure itself. Indigenous paradigms typically allow more input from community members than is found in the more conscribed roles assigned in the Anglo-American system. Indeed, many descriptions of indigenous justice systems invoke the image of a circle or community gathering. Moreover, many of these traditional justice systems are typically intertwined with spirituality and ceremonial practices. Unlike the secular Anglo-American court system, traditional indigenous dispute resolution practices are often preceded and guided by prayer. The decision-making process is often facilitated by a medicine woman or man, who may have long-standing relationships with the parties in dispute. Regardless of the nature of the dispute, indigenous cultures typically had specific, holistic methods of bringing together interested parties and developing a solution to the dispute that involved extensive discussion, debate, and often compromise.

28.3 Indigenous Law Today

Today, indigenous peoples continue to make law and govern themselves. The UN Declaration of the Rights of Indigenous Peoples recognized the indigenous right to self-determination, including the right "to self-p. 521 government in matters relating to their ↳ internal and local affairs." Within the United States, federal law acknowledges the right of "Indians to make their own laws and be ruled by them."[5]

Yet indigenous law has not remained static. Like Euro-Americans, indigenous peoples have borrowed from the legal systems they encountered. In the United States, many indigenous communities have adopted the institutions, practices, and norms of Euro-American-style state governance to advance their rights to sovereignty and self-determinations. The vast majority of federally recognized Native nations today have written constitutions, which enumerate a dual or tripartite form of government, including democratically elected legislative and executive bodies, and many have an adversarial judicial system.

In one sense, these transformations of Native legal systems reflect a legacy of colonialism and a history of deeply unequal power. As discussed further in section 28.4, over the nineteenth and twentieth centuries, the federal government pressured Native nations to adopt adversarial court systems that mirrored state systems. Several indigenous nations complied, particularly the large southeastern tribes whose transformation led them to be known as the five "civilized" tribes. The Cherokee Nation established its own Supreme Court in 1825, preceding the establishment of the Georgia Supreme Court by nearly twenty years. Yet this significant effort toward assimilation did not insulate the Cherokee Nation from forced removal to Indian Territory just a few years later.[6]

The imposed model of adversarial dispute resolution was often a bad "fit" for communitarian tribal cultures. More traditional indigenous people simply ignored the structure of adversarial justice altogether. Moreover, unscrupulous federal and military officials strategically used newly established tribal courts as a method to "divide and conquer"—pitting one indigenous leader against another as part of the larger colonial project to divest indigenous governments of land and political power. Many of the first "tribal" court systems were actually established and operated by the federal government itself. Named the "Courts of Indian Offenses" (CIO), the systems were put in place to punish Indians who adhered to their traditional beliefs and practices. These tribal courts morphed over time to more closely resemble American courts, and by the twenty-first century, only a few CIO courts remained. Contemporary tribal courts are typically under the control of tribal nations but may receive all or part of their budgets from federal dollars.[7]

However, it would be a mistake to read present-day tribal law and legal institutions as solely colonial impositions. Many Native communities have adapted "Western"-style governance structures to incorporate their unique legal cultures and heritages—that is their indigenous legal institutions, practices, and norms—as sources of law and authority. For example, many tribal courts allow the introduction of
p. 522 expert testimony to help ↳ judges understand indigenous legal principles that will help inform a resolution to the case. These systems could be characterized as "hybrid" models that use elements of Anglo-American law and indigenous law. But even here, we remain cautious about using notions like "adaptation" or "hybridity" when describing contemporary indigenous legal systems, if only because (given their metaphoric extension from evolutionary biology) they might seem to suggest that the dynamism of tribal law and legal institutions is primarily the product of their responsiveness to colonization.[8] Even worse, such a view implicitly suggests that so-called traditional indigenous law was conversely static and unchanging. We resist this, and in so doing note that today some indigenous nations continue to operate dispute resolution systems that are best described as dynamic systems growing primarily from traditional indigenous principles. It is unknown how many indigenous cultures operate under this regime because these systems are usually not courts of record that share proceedings or results with the outside world.

The dynamism of indigenous legal orders is clear if we return to the Hopi as a case study. In 1936 the Hopi Tribe ratified the Constitution and By-Laws of the Hopi Tribe. This document provided for the creation of a representative legislative body called the Hopi Tribal Council, an Executive branch led by the Hopi Tribal Chairman, who also sat on Council, and the development of a Hopi Tribal Judiciary. Yet even as the Hopi Constitution federated the once-autonomous Hopi villages into a single Hopi Tribe to be governed by a Euro-American-style representative democracy and adversarial legal system, it is also contained provisions that reserve a considerable amount of civil adjudicatory authority to the traditional Hopi leaders from the various clans in each of the twelve villages. Article III of the Hopi Constitution explicitly reserves to Hopi traditional leadership the appointment of guardians for children without parents, the resolution of family disputes, the regulation of inheritance of property, and the assignment of farming land. In recent years, the question of how the reservation of powers to traditional Hopi leadership jibes with the scope of authority of other branches of Hopi government has been a matter of central concern adjudicated in several key cases before the Hopi courts, and is a leading theme of contemporary Hopi case law. Were an observer of Hopi law not aware that the source of law and authority in Hopi clan leaders came not primarily from the language of the Hopi Constitution but from the complex socioreligious system of Hopi village ceremonialism, and the norms of "cooperation without surrender" that they enshrine, the observer would likely miss the deeply held significance of the this reservation of traditional authority, and one of unique ways in which Hopi legal structures, norms, and practices endure despite years of colonial domination.[9]

The same is true of countless other indigenous nations around the world, including in the United States. Thus whether it is visible in the creation of Navajo Nation peacemaker courts, or in the song duels of some p. 523 of the Inuit peoples of the Arctic, or the provisions ↳ for restorative rather than retributive justice in any number of contemporary tribal legal systems, failure to attend to the particular indigenous legal institutions, practices, and norms and their historical and cultural underpinnings can result in losing sight of the unique contours of a contemporary indigenous law that might otherwise look much like the Euro-American settler colonial systems imposed on them.

28.4 Colonizers' Constructions of Indigenous Law

As a category constructed by non-Native outsiders, indigenous law has always been closely tied to colonialism. In what became the United States, would-be colonizers oscillated between denying the existence of indigenous law altogether and acknowledging it within US law both formally and informally.

28.4.1 Lawlessness

When Europeans first encountered North America's indigenous inhabitants in the sixteenth and seventeenth centuries, they had difficulty grasping the category of indigenous law. Many Europeans resorted to stock depictions of Native peoples as a people without law. This trope of supposed "lawlessness" proved a remarkably persistent feature of European discourses about North America's indigenous peoples and the starting point for much early modern political philosophy. Thomas Hobbes, for instance, depicted the continent's Native peoples as exemplary of the state of nature: they could not make laws, he argued, because they had "no government at all." John Locke used the exact same words to describe America in his canonical *Two Treaties of Government*. Many, though not all, European settlers who actually encountered Native peoples echoed these theorists' claims of lawlessness.[10]

Scholars have offered differing explanations for Europeans' failure to recognize indigenous norms as law. An older strain of scholarship attributed it in part to mutual incomprehensibility: Native and European legal orderings, rooted in their own traditions, were simply too different to be legible across this yawning cultural divide. More recent scholarship, by contrast, has emphasized similarities as much as differences in indigenous and European concepts of law, particularly in the early modern period. To be sure, nearly all Native peoples lived within what anthropologists label non-state societies, and so lacked the formal legal p. 524 institutions and state imprimatur that supposedly ↳ categorized law. But this conception of law as derived from, and uniquely bound up with, the state is an overly positivist portrait that fit early modern Europe poorly, too. In practice, much European "law" of the period consisted, like indigenous law, of a complex mélange of customary practice and religiously inflected rules, derived from and legitimated in ideas about community, that were intended to create and regulate a properly ordered society. These similarities, recent works have argued, did not quell disagreement or violence; if anything, as Alan Greer has suggested with shared concepts of property, it heightened conflict, as each side was keenly aware of the stakes in whose norms would prevail.[11]

Viewed in this frame, it is clear that European, and particularly English, portrayals of indigenous peoples as lawless did important ideological work: they furthered what scholars have described as settler colonialism, which imagined a continent empty of Native peoples. Ignoring indigenous law, with its potential to legitimate Native rights to property and autonomy, advanced this more general process of erasure.

There were nonetheless ways in which indigenous law diverged from European understandings that led Europeans to reject its categorization as *law*, even as they grasped its normative sway within Native communities. Perhaps the most central issue was coercion. Early modern European law relied extensively on exemplary, legitimate violence, doled out by masters, magistrates, and patriarchs against their supposed subjects, to uphold the legal order. Violence—even the sort of public, ritualized violence associated with law by Europeans—was endemic in Native North America, too, but it emerged primarily in conflicts *among* groups rather than as a form of internal social control. Within Native societies, authority usually rested with localized units of villages and clans; individuals exercised power through influence and suasion rather than command. Communities remedied harms through compensation and reciprocity—including, at times, through notions of individualized revenge. But there was little sense of violent punishment in the name of the community, and when Natives encountered this system, they were often appalled. “The very word law,” an eighteenth-century missionary among the Haudenosaunee reported of their response to Anglo-American criminal punishments, “is odious to them.”[12]

The apparent absence of coercion within Native society led some Europeans to valorize indigenous communities as uniquely free. Particularly in the late eighteenth century, with the ascendance of the stadial theories of development of the Scottish Enlightenment, indigenous communities were understood to represent an earlier stage of humanity’s history characterized by primitive simplicity. Various of the “Founders” of the United States, including Thomas Jefferson and James Madison, at times adopted language that p. 525 ↳ endorsed this view, but one of the clearest articulations came in a widely reprinted 1789 newspaper article supposedly penned by the Haudenosaunee leader Thayendogea/Joseph Brant, in which he roundly condemned Anglo-Americans’ pretensions to legal superiority: “In the government you call civilized, the happiness of the people is constantly sacrificed to the splendor of empire,” Brant supposedly opined, “from hence your codes of criminal and civil Laws have had their origin, from hence your dungeons & Prisons.” Brant went on to praise the absence of hierarchy and the lack of the “pompous parade of courts” within Haudenosaunee society. Regardless the accuracy of the supposed attribution of this statement to Brant—his biographer has deemed it likely genuine—it suggests the currency of critiques of Anglo-American law *within* Anglo-American society as contrasted with indigenous law.[13]

Yet for most Anglo-Americans—particularly those federal officials charged with managing so-called Indian Affairs—the lack of coercion within Native societies was a harm, not a boon; it presented substantial challenges of governance. Accordingly, Anglo-Americans undertook to transform indigenous law as part of their broader effort to “civilize” Native communities. They were particularly assiduous among the Native nations of the US Southeast: Benjamin Hawkins, the region’s federal Indian agent, celebrated when the Creek Nation executed six alleged criminals (including one white man) as evidence that “the right of revenge might be transferred from private hands to a public jurisdiction.” Increasingly, as Native nations confronted the ravages of US imperialism, they came to adopt legal systems that resembled both in form and in content those of their Anglo-American neighbors—a shift that, as discussed earlier, simultaneously reflected and resisted the colonial project.[14]

This transformation nonetheless did not assuage Anglo-American accusations of lawlessness, which remained a constant feature of depictions of Indian country and a powerful justification for the extension of US jurisdiction. Over the course of the nineteenth century, the US Supreme Court, which ultimately blessed the assertion of federal control over nearly every facet of Native life, routinely characterized indigenous law as the “red man’s revenge” or “the crude customs [Natives] inherited from their ancestors.”[15]

The US Supreme Court and other federal courts no longer employ such explicitly racialized language to characterize indigenous law. Nonetheless, echoes of past rhetoric of indigenous lawlessness persist. In recent decisions, the Court has voiced suspicion about the content of indigenous law as applied within tribal courts, particularly when unwritten and reflecting a community’s “values, mores, and norms.” This perspective has led the Supreme Court to cabin the scope of indigenous law and presumptively bar its application to non-members of the tribe. This conclusion has sometimes led to pernicious consequences: p. 526 stripping tribes of jurisdiction over their own territories, ↳ for instance, has contributed to an epidemic of gender-based and sexual violence in Indian country often committed by outsiders. These harms are particularly deeply felt because they strike at the significant role that Native women play within the political and cultural lives of their communities, many of which have long maintained gender norms that diverged from the patriarchal traditions of Anglo-American society.[16]

28.4.2 Legal Pluralism and the Informal and Formal Recognition of Indigenous Law

Despite these efforts at erasure, Anglo-American law has also recognized and at times incorporated indigenous legal norms. This incorporation reflects the persistence of legal pluralism, in which multiple legitimate legal orders coexist, within the United States. Scholars have noted that legal pluralism sometimes consists of informal, implicit recognition of multiple legal orders, and sometimes reflects formal efforts to create fixed rules to govern the relationship between multiple bodies of law. Both forms appear in the history of Anglo-American recognition of indigenous law.[17]

When Anglo-Americans settled in North America, they encountered a continent demographically and politically dominated by indigenous peoples. This reality of Native power meant that although the new arrivals might have dreamed of subordinating Native peoples to their jurisdiction, in practice Anglo-Americans were largely obligated to obey indigenous law. This obedience, recent scholarship has traced, took a variety of forms. Perhaps most significantly, it required following indigenous diplomatic norms governing the relationships among peoples. Anglo-American meetings with Native leaders might sometimes have culminated in written treaties that reflected Anglo-American legal traditions, but they required extensive adherence to indigenous protocols: edge-of-the-woods ceremonies, lengthy, highly stylized oratory reaffirming relationships, elaborate exchanges of gifts and food, and the presentation of belts of wampum memorializing the occasion. So, too, Anglo-American weakness often required accepting indigenous understandings of justice in resolving cross-cultural crime. Compensation and restitution—what Anglo-Americans understood as the indigenous practice of “covering the grave”—often replaced state-imposed punishment as the method to restore peace and repair the harm caused by violence and theft.[18]

p. 527 This informal recognition also carried into the realm of property law. This outcome is surprising given that one of the core Anglo-American legal projects was to erase indigenous territory and replace it with ideas of landed property rooted in the common law. Yet it was precisely this search for secure title that led Anglo-Americans to acknowledge, and seek to understand, Native ideas of ownership. Because of their desire for security, Anglo-Americans early on adopted the near ubiquitous practice of purchasing indigenous lands. Yet establishing a paper trail legitimating ownership required identifying Native owners and property rights. There was a great deal of disregard and even duplicity in what one historian has labeled the “deed game”—the push to get purported Native owners to sign a paper transferring ownership—but it was predicated on the idea that ostensible Native consent to alienate land was essential and legally meaningful.

In the process, Anglo-Americans found themselves puzzling through, with varying degrees of good faith, indigenous property law and the rights it conferred on individual Indians.[19]

The preconditions for such informal recognition—Native power and Anglo-American weakness—persisted well into the nineteenth century over large swathes of North America. Much of the continent remained what one scholar has dubbed Native ground, dominated by indigenous law; other parts remained borderlands where Natives and non-Natives freely mixed, and where law was characterized by hybridity and promiscuous borrowing. But, particularly in eastern North America, the rise of the United States, and particularly the federal government, provided Anglo-Americans powerful tools to fulfill their dreams of subordinating and erasing indigenous jurisdictions. Yet this rise also paradoxically led to the formal recognition of indigenous law *within* the newly established category of federal law.[20]

Early on, federal law often acknowledged indigenous law only elliptically and indirectly, establishing a legal space of "Indian country" largely outside federal and state jurisdiction in which Native law was presumed to govern. Yet over the nineteenth century, jurisdictional conflict increasingly led the federal government to clarify, and codify, the relationship between these multiple bodies of law. The result was the federal enactment of formal promises that guaranteed Native nations the right to govern themselves under their own laws and, in some instances, exclusive jurisdiction over their own members. That such provisions often appeared in treaties through which the federal government sought to justify the forcible removal of Native peoples was no coincidence: these treaties reflected a vision of the existence of multiple legally distinct and p. 528 separate ↳ spaces within the United States, all under the supremacy of federal law. Although this vision of separation proved illusory, it nonetheless helped Native nations secure formal recognition for their laws and institutions under federal law, even if that recognition was always precarious and subject to federal displacement.[21]

This pattern of formalization has endured and even expanded, especially as federal policy toward Native nations has shifted to embrace self-determination. Tribes continue to create their own laws, both written and customary, enforced in their own courts. For federally recognized communities, federal law protects this jurisdiction over their own members as well as, in certain instances, non-members. In some areas of law, particularly family law, the federal government has made indigenous legal rulings binding on federal and state courts; in other instances, those courts routinely recognize tribal court judgments as a matter of comity. Such recognition nonetheless remains tentative and liable to what the Supreme Court has called "divestiture." This uncertainty continues to place pressure on Native communities to conform their laws to state and federal practices. In some instances, the federal government has explicitly predicated its recognition of indigenous jurisdiction on the adoption of particular norms drawn from the Anglo-American constitutional tradition. Recent federal legislation, for instance, permitted federally recognized tribes to exercise limited criminal jurisdiction over non-Natives as part of an effort to staunch the violence directed particularly at Native women, but required that participating tribes opt in to a lengthy list of procedural guarantees.[22]

Despite these limitations, the formal recognition of indigenous jurisdiction within US law is an important success for Native communities. It is, commentators have observed, distinctive of the United States: other Anglophone common-law countries have developed their own legal orders that accommodate indigenous peoples, but they have not formally recognized the inherent and independent lawmaking power of Native communities that US law calls sovereignty. The endurance of this srecognition in the face of the centuries-long narratives of indigenous lawlessness, which sought to erase and deny indigenous law, is paradoxical, but it is not accidental. It reflects, rather, a long legacy of Native activism and persistence. The ideology of colonization might have insisted that indigenous law did not exist, but indigenous peoples insisted that it did, and they successfully forced their would-be colonizers into a halting and incomplete recognition of this undisputable reality.[23]

28.5 Conclusion

As this brief survey suggests, the category of indigenous law conveys multiple meanings. The simplest, and most capacious, is simply to describe and acknowledge the reality that indigenous peoples have crafted law since time immemorial, and continue to do so today as autonomous, self-governing communities. Although this may seem an obvious truth, its denial was at once both a key means and one of the fundamental harms of colonialism, which sought to erase indigenous jurisdiction. The survival of indigenous law, and its formal and informal codification into US law, is thus an important and noteworthy success of Native resistance to colonialism.

Another, and more complicated, meaning deploys indigenous law as a foil to Euro-American "law." As we have discussed here, this understanding has some truth to it. Although diverse and thus hard to generalize about, indigenous law broadly conceived *did* differ in important ways from the legal tradition that developed within Europe. Less bound up with the state, more rooted in localized and communal sources of law and authority, indigenous law was also less hierarchical and more focused on restoration rather than exemplary punishment.

Yet this comparative frame, while important, itself requires careful context and critique. One of the complicated harms of colonialism is its entrenchment of European law as normative. Thus, while the current trend is often to romanticize indigenous law as *better* than systems of the dominant society, rather than to denigrate indigenous law as lacking, both conceptions fail to take indigenous law on its own terms: they continue, rather, the solipsism of colonialism, which reads indigenous law primarily for what it tells colonizers about themselves. This perspective ignores the reality, too, that after centuries of exchange and encounter, the law that indigenous peoples craft for themselves has also changed. The story of indigenous law is not simply a story of loss and colonization: it is also a narrative of adaptation and hybridity embraced by Native communities. In this sense, the law that these communities adopt today is, and deserves acknowledgment as, indigenous law, whatever its source, nature, and relationship to "traditional" indigenous practices.

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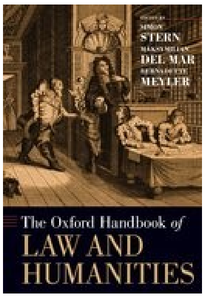

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CHAPTER

29 Property: Changing Formations of Having and Being

Sarah Keenan

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Abstract

This chapter traces changing Anglo-European conceptions of property and their legal manifestations since John Locke, focusing on the common law world. Tracing this history of property requires an attentiveness to constructions of race. The chapter begins by outlining Locke's concept of property and its relationship to seventeenth- and eighteenth-century British colonialism. Engaging with Cheryl Harris's crucial insight that whiteness is property, it discusses conceptual and legal overlaps between having and being in dominant property regimes. The Lockean concept of property constructed land as an object essentially interchangeable with capital, a notion which found legal form in title registration and other legal initiatives which made land more alienable than it had previously been, thus assisting the colonial project of Indigenous dispossession. With the growth of the corporation and the credit economy since the nineteenth century, ownership has been divorced from control in ways that challenge the model of property put forward by Locke and other Anglo-European philosophers. In the culture of debt which pervades twenty-first-century capitalist economies, the subject of property is often also a debtor. This subject tends to be produced not through labor or metaphysical recognition but through increasingly algorithmic consumer surveillance and risk profiling which reproduces social categories including race. To understand property's changing formations, there is a need for approaches that take seriously property's white supremacist history and seek out alternative modes of having and being.

Keywords: property, racism, whiteness, colonialism, capitalism, subjectivity

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PROPERTY is a concept central to Anglo-European law, culture and philosophy. It is also a concept that is difficult to define.[1] Property is used to denote belonging and justify exclusion in a wide array of contexts. It is at once a highly technical area of law, an everyday spatial marker, an overdetermined economic reality, a justification for colonialism, a strategy of resistance to environmental destruction, and a cultural indicator of what it means to be fully human. Property is a concept that travels between ordinary words and condensed theories.[2] That travel facilitates useful discursive reflections between disciplines, and shows that property "in the world" is a malleable reality. While concepts, as Meike Bal argues, are usually considered to be abstract representations of a "real" object, like all representations, they distort, unfix, and inflect the object.[3] At the same time, the object itself diverts and complicates concepts of it. Property as concept and property as object interact with and "speak to" one another; they cannot be clearly separated from each other.[4] A meaningful understanding of property thus requires an attentiveness to both its conceptual and practical lives and the relationship between the two.

In this chapter, I trace changing Anglo-European conceptions of property and their legal manifestations, from John Locke, focusing on the common law world. Tracing this conceptual and legal history of property necessarily involves an attentiveness to constructions of race. Building on Cheryl Harris' influential insight that whiteness is property, this chapter will argue that although over the centuries property has changed in conceptual and practical formation, its intimate connection with race has remained constant. I begin by outlining Locke's concept of property as being produced when subjects take possession and control of land, p. 532 and its relationship to seventeenth- and ↳ eighteenth-century British colonialism and white supremacy.[5] I then outline a less discussed legacy of Locke's concept of property, which Nicole Graham refers to as the "dephysicalization" of property in land: the construction of land as an object waiting to be controlled and essentially interchangeable with capital.[6] The objectification and increased alienability of land is exemplified by title registration systems, which assisted the colonial project of Indigenous dispossession. The dephysicalization of property in land was followed by the growth of the corporation and of the credit economy, both of which I argue divorced ownership from control in ways that challenge Lockean models of property based on a subject controlling an object. In the culture of debt which pervades twenty-first-century capitalist economies, the subject of property is often also a debtor. This subject tends to be produced not through labor or metaphysical recognition but through increasingly algorithmic consumer surveillance and risk profiling which reproduces social categories including race. To understand property's changing formations, there is a need for approaches that take seriously property's white supremacist history and seek out alternative modes of having and being.

29.1 "In the Beginning, All the World was America": Property, Enclosure, and Colonization

Examining the theory of property put forward by seventeenth-century English philosopher John Locke is helpful not only for understanding property law principles implemented throughout the former British Empire but also for understanding British colonialism and white supremacy. Locke famously put forward a justificatory theory of property whereby land could be legitimately appropriated by enclosing and p. 533 cultivating it. Locke argued that at the beginning of time the world was given by God to men in ↳ common, "yet every Man has a Property in his own Person."[7] This property which "every Man" begins with, consists of "the Labour of his Body, and the Work of his Hands."[8] When a man mixes his labor with land given to men in common, that land becomes an extension of him: it is taken out of the commons and rightfully becomes the man's property. According to this theory, the mixing of land and labor to produce property applies to land in "the State of Nature"[9] by which Locke meant land that was not physically enclosed pursuant to an agreed set of laws. The "Civiliz'd part of Mankind" would posit such laws, while "the wild Indian who knows no Inclosure" would not.[10] Citing passages from the Bible, Locke asserted that "in the beginning all the World was America," by which he meant a wasteland improperly used by its native inhabitants, and waiting to be appropriated by civilized men.[11]

Locke's conceptualization of property provided a justification for the enclosure of common lands and a system in which title to land was based on possessive control of it. From the fifteenth to the nineteenth century, English land formerly held in common was enclosed into privately owned lots, a violent process which fundamentally changed English social and economic structures, paving the way for the capitalist system that exists today.[12] Peasants forcefully displaced from common lands during the enclosures were forced to sell their labor to pay rent to landlords.[13] Their labor did not form the basis of property rights under Locke's formulation, because for Locke "labor" equated only to specific forms of possessive control.[14] Enclosure, Nicole Graham explains, had become so widespread in England by the nineteenth century that it formed an essential part of the basis of the shift from feudal to capital economies at the scales of both nation and empire.[15]

Locke's theory of property served as a justification for colonialism in America and beyond, but only with the assistance of other complementary theories. Locke's theory is often used to explain Britain's assertion of sovereignty over the continent now known as Australia in 1770 on the basis that the land was *terra nullius* (belonging to no one). Yet there was never any legal declaration that the land was *terra nullius* during the early decades of British settlement in Australia.[16] Rather, it was the operation of various discourses of power which explains why the common law failed to recognize Aboriginal rights to land, including the racist presumption that Aboriginal people were barbarous and thus incapable of owning land.[17] In reality,
p. 534 Aboriginal Australians, like Native ↳ Americans, had long operated a sophisticated, successful, and sensitive land management and farming regime integrated across the continent.[18] While the racist idea that Aboriginal people had no rights to land is consistent with Locke's writings, *terra nullius* only began to be articulated as a concept in Australian law in the 1970s following legal claims for Aboriginal land rights.[19] The Lockean conception of property only became a coherent justification for legal property regimes through decades of practical application, which have been reliant on broader power relations including, significantly, racism.

Analyzing centuries of American law since British colonization, Cheryl Harris has powerfully demonstrated how possession—the legal basis of title—has been defined only to include the cultural practices of white people.[20] Native Americans' prior relationship with land should, under common law principles, have given them property rights, but their racialization as native rendered their possession ineffective. In the Australian context, Aileen Moreton-Robinson argues that whiteness itself is built on a possessive logic.[21] That is, whiteness as a category has been constituted by the violent, possessive practices of early British colonists and their descendants, whose national and cultural identity is formed through embodying these practices and disavowing the reality of Indigenous sovereignty. Property and whiteness have thus been mutually constituted through British colonialism. Indeed, Harris's argument is that whiteness is property: it is an exclusive, protected legal category which confers on those who have it an array of benefits including, historically, protection from being enslaved and colonized.[22]

Theories of property based on Locke's self-owning subject give rise to conceptual tensions over ownership and identity.[23] This tension arises because Locke's subject is a split self: as a self-owning person, he is both the owner/subject of property and the owned/object of property.[24] The split subject meant it was conceptually possible for a person to be the object of property, an idea which is consistent with the chattel slave trade in which Locke was both personally invested, and employed as an administrator throughout the late 1600s.[25] Bernasconi and Mann argue that Locke's theory of property and its justification of the
p. 535 colonization of North America was also a defense of slavery, ↳ because slavery was understood to be indispensable to the profitability of the new American colonies.[26] Whatever Locke's personal motivations and beliefs, his theory of a split self allows for the conceptual possibility of slavery.[27] The theory found favor among British colonists during the period that Enlightenment methodologies of categorization and differentiation were being developed, alongside ideas about the "natural" inferiority of non-Europeans, and an increasingly profitable slave trade.[28] Title to slaves was manifested through possession, as title to land was. It is thus clear that Locke's theory of "every man" as a presocial subject who always already has property in his own person was also a theory of identity.

29.2 Dephysicalization and Alienation

Nicole Graham argues that while it has been much discussed that Locke's theory was used as a justification for the enclosures and colonization, "Locke's understated contribution to modernity is his rationalization of the physical severance of people and place."[29] For Locke, land is a passive object waiting to be enclosed and cultivated. Focusing on the colonial exportation of English land law to Australia, Graham argues that land was seen by colonists as "placeless" and interchangeable with capital. During the eighteenth and nineteenth centuries, colonial land law was amended in various ways to "dephysicalize" property in land, ignoring the messy uncertainties and contestations of lived relationships between place and people, and thereby making property in land a far easier object to alienate, trade, and financially invest in than ever before.[30] Other work on the exportation of property law throughout "settler colonies" of the former British Empire supports Graham's argument.[31] While the law of primogeniture, for example, continued in England until 1925, it was abolished in the colony of New South Wales in 1862, disrupting the English class system and making it easier for women to inherit land.[32] And while prior to the seventeenth century it was difficult to alienate land through a debt transaction under English law, such alienation became widespread in early p. 536 colonial ↳ America, with colonists inducing Native Americans to take out "loans" in exchange for mortgages over their land which were then foreclosed on.[33] As K-Sue Park argues, land in the colonies was treated as a money equivalent, a treatment which contributed to the dispossession[34] of Native Americans from their land, and which foreshadowed contemporary predatory lending practices.[35]

Property law reforms aimed at increasing the alienability of land in the colonies have also been made, at a more gradual pace, in England. Attitudes toward English land and the traditionally slow pace at which it was conveyed began to shift following the Industrial Revolution. Title to land was based on possession, it was relative rather than absolute, and conveyancing was a complicated and time-consuming legal process. Alain Pottage explains that transmission of ownership involved proving a historical chain of possession back through previous owners.[36] Retrospection was thus key to common law conveyancing, and prospective purchasers would have to satisfy themselves that the genealogy or "chain" of the title had been proven back to a point in time after which it was unlikely that any rival claims to it could emanate. Throughout the 1800s, the labor-intensive process of constructing title deed chains came to be regarded as an impediment to a free market in land.[37] An 1857 Royal Commission report proposed a title registration system in which an entry in the register would legally constitute the title. The proposal had the stated goal of enabling buyers and sellers "to deal with land in as simple and easy a manner … as they can now deal with moveable chattels or stock."[38] The proposal was strongly opposed by much of the landed aristocracy, who feared a registry would make conveyancing too easy, turning land into a commodity that *anyone* with the appropriate funds could purchase.[39] Despite this opposition, by 1897 registration of title was made compulsory for some transfers of English land.

While debates over the appropriateness of transferring land through a registry continued in England throughout the nineteenth century, title registration was implemented at far greater speed in Australia and p. 537 other parts of the British Empire. For most English ↳ subjects, land in the colonies had a different social and political meaning from land in the mother country: colonial land was "in the State of Nature."[40] As Buck writes, while land in England was owned by a small aristocratic class, "in the colonies, by contrast, land seemed, in theory at least, to be open to all—a source of wealth, not as a stable element in life, but transitory and transferable in its nature."[41] In 1858, the "Torrens system" of title registration was introduced in the colony of South Australia. Designed to facilitate a new and secure speculative market in cheap and legally unencumbered South Australian land, Robert Torrens' system set out the principles through which the registry would operate to be the independent source of title. Consistent with Graham's argument that land came to be dephysicalized and treated as interchangeable with capital during British colonialism, the Torrens system aimed to maximize the alienability of land by treating it like ships and shares.[42]

The principles of the Torrens system—commonly described as the “mirror,” the “curtain,” and insurance—block out historical and physical details about the land in order to conceptually produce land title as a clean, secure, easily alienable asset.[43] The “mirror” principle dictates that a publicly available register will accurately and completely reflect the interests which affect the land within its coverage. The “curtain” takes further the selective two-dimensional representation of land produced by the “mirror,” by drawing a metaphorical curtain across all prior and existing interests in the land that do not appear in the “mirror” and rendering those interests unenforceable as property interests.[44] And under “the insurance principle” the state guarantees the accuracy of the register and will compensate any registered title-holder who suffers a loss due to a registry defect.[45] Much like a magician’s smoke and mirrors, the registry’s “mirror” and “curtain” block prior unregistered interests from legal view while the registry conjures up fresh, indefeasible titles.[46] Torrens titles are independent of their predecessors and free of the encumbrances of historically derived local land use patterns and custom. As famously described by Australian High Court Chief Justice Barwick in *Breskvar v. Wall*, Torrens is “not a system of registration of title but a system of title by registration”[47]: that is, registration in the Torrens system is not merely the recording of pre-existing title, it is the manufacturing of title—every title is new, indefeasible and guaranteed for the registered holder. Described as “the jewel in the Crown of colonial land management,” after its inception in South p. 538 Australia the Torrens system was quickly exported throughout ↳ large parts of the British Empire.[48] As it legally disappears precolonial relationships with land, the Torrens system has the effect of categorizing those who have precolonial relationships in a way which is both temporal and racial: those with precolonial relationships with land are “Indigenous,” their rights to land consistently hidden by the curtain and their racial categorization defined by this legal disappearance.[49]

29.3 Financialization: Divorcing Ownership from Control

The increased alienability of property in the eighteenth and nineteenth centuries accompanied the increased role of credit in the British economy.[50] During that period, wealth had been extracted from the colonies at unprecedented levels, and the boom in trade and associated commercial activities was accompanied by the normalization of bills of exchange, bank checks, and other written financial instruments. The growth of economies of credit and, therefore, of debt, has implications for property. Examining these implications, Bill Maurer explores the argument put forward by commercial lawyers in the late 1990s that considering the quantity, pace, and patterns of contemporary stock exchange, “the property law construct is inadequate and unworkable.”[51] That is, the very concept of property has become irrelevant in the modern day economy, specifically in the USA but by extension in most of the world, where international stock markets have material effects on people’s lives (whether directly or indirectly). At stake in the argument that property has become an inadequate and unworkable construct, Maurer argues, “is not merely a new definition of property but a new definition of personhood and a new form of governmentality.”[52] In these new definitions, Maurer argues, the subject of property is not a bearer of rights but is instead a risk profile subject to the disciplinary practice of insurance.[53] Suggesting that it might be time for property theorists to forget Locke, Maurer argues that “the Lockean and Hegelian subject of property takes a back seat to a system of statuses based on one’s investment in that temporality [of capitalism], as ownership itself evaporates into risk profiles.”[54]

Unlike Locke’s subject, who already has property in himself, nineteenth-century German idealist Georg W. p. 539 F. Hegel’s subject is not born with property but must acquire ↳ it in the process of becoming fully human/a proper subject. Hegel argued that the subject begins as an abstract free will, which is purely individual and thus not yet in a relation with the external world.[55] The subject “must translate his freedom into an external sphere"[56] by putting his will into external objects and making them his own.[57] His externalized will is then taken back into himself in the form of property—the subject recognizes that "I, as free will, am an object to myself in what I possess."[58] As Davies summarizes, "I become an actual person by relating to myself through the external world."[59] Property for Hegel is thus an essential part of the process of becoming a proper subject. Though different from Locke's subject-object distinction, Hegel's starting point also assumes a clear separation between persons and things external to them.

Behind Maurer's analysis of the decreasing relevance of Lockean and Hegelian models of property is the economic reality of the growth, in early twentieth-century America, of widespread stock ownership and the ideal of an investor democracy, in which ordinary citizens could share in the wealth generated by corporations by becoming shareholders.[60] Maurer explains that many early twentieth-century commentators were troubled by the invention of the joint stock corporation because they felt that it might jeopardize the capitalist system "by separating ownership (founded in stocks) from control and management (founded in corporate executives' power and privilege) of corporations."[61] As Julia Ott argues, the ideal of an investor democracy arose alongside the corporatization of industry and the shift from an agricultural-based economy to one dominated by manufacturing.[62] This shift was accompanied by a decrease in the incidence of individual land ownership, which had been high among free white men in earlier colonial periods. Leading American economists saw the spread of corporate securities ownership as a way to preserve the ideal of individual property ownership which gave owners a vested stake in the success of the nation, even though the nature of property ownership shifted from direct control of physical assets to fungible financial claims.[63] Examining the war bonds issued by the US government to help fund World War I, Ott argues that "policy makers looked upon mass investment in federal war debt as a means of encouraging a widespread sense of identification with the war effort and the nation itself."[64] That is, ownership of this dephysicalized form of property was seen as productive of the subjectivity of a good citizen, replacing the older Lockean theory that tied good citizenship to the possessive use of land.

The early twentieth-century growth of popular stock ownership in the USA was followed by the significant growth of increasingly global financial markets in the 1970s, when deindustrialization made it more profitable for capitalists to invest in anticipated ↳ p. 540 future production, represented in securities, rather than present production.[65] The 1970s saw the beginning of debt securitization (including, significantly, mortgage debt), that is, the practice of pooling together and repackaging debts to transform them into tradable securities that can be sold to investors.[66] The securitization of mortgages grew rapidly in the 1990s in the USA, the UK, and other parts of the world. This growth was only possible with the newly innovated practical legal mechanisms and techniques used to transfer large numbers of securities at record speed. In his analysis of changing formations of property in the context of securitization, Maurer's focus is on the process of securities clearance—that is, the process by which orders for securities are matched with the parties who issue them.[67] Another innovation of this period was the Mortgage Electronic Registration System (MERS) which was designed by a number of prominent corporate and US government mortgage market players to facilitate the exploding number of mortgage assignments taking place for the purpose of securitization.[68] In reasoning similar to that put forward by Torrens and his supporters in the 1800s, the groups which innovated MERS in 1993 asserted that the paper-based process for transferring mortgages was too slow, time-consuming, and inefficient. Their solution was to introduce MERS, which today has more than 60 percent of all residential mortgages in the country registered on its system, including virtually all subprime mortgages.[69]

The technical legal innovations which facilitated the growth of securitization not only increased the speed at which property could be bought and sold, they also changed the nature of property, stretching it beyond the subject-object model theorized by Locke and Hegel. While nineteenth-century title registration and other colonial innovations served to dephysicalize property, making it easier to alienate, twentieth- and twenty-first-century financialization and securitization shifted the spatial and temporal make-up of the subject and object of property.[70] Maurer argues that "[w]ith investment entities like futures and options, the property interest does not precede the share in time but follows it; it is a trace of a future, not a past."[71] The subject of property Locke (and Hegel) envisioned was one who owned and controlled a whole, identifiable physical object (most relevantly, land) in the present. Today, the prevalence of financial property and of the corporate form which divorces ownership from control makes both the object and subject of property difficult to identify. In the USA, the UK, and elsewhere, many p. 541 ↳ homeowners are in significant mortgage debt.[72] So while an indebted homeowner is the subject of property in the sense that she owns legal title to her house, her ownership is conditional on her ongoing payments to her bank, which also has a property interest in her home, and which wields significant control over both her and it. When her debt is repackaged and sold to speculators, it is difficult to identify the precise bounds of her interest/the object of her property. In this context, Annie McClanahan identifies the deep contradiction "between the ideology of ownership as stability, self-sufficiency, and social commitment, on the one hand, and the material reality of credit arrangements and foreclosure law on the other."[73]

In her consideration of twenty-first-century debt culture, McClanahan discusses the debtor as the new subject of property, with ownership but without control.[74] This debtor/subject of property is produced not through labor (as Locke argued) or through metaphysical recognition (as Hegel argued) but through increasingly algorithmic consumer surveillance.[75] A subject's ability to access credit (and thus become, simultaneously, a debtor and an owner) is based on purportedly neutral data designed to predict the subject's likelihood of repaying the loan. However, the algorithms, data collection, and analysis used remain firmly socially embedded, because such access is calculated based on information such as the applicant's employment history, address history, health history, salary, and court judgments[76]—histories that are determined in part by social categories, race in particular.[77] Virginia Eubanks explains that most people are targeted for digital scrutiny as members of marginalized social groups, rather than as individuals, and this targeting then reproduces the social group.[78]

Consistent with Maurer's argument that "ownership itself evaporates into risk profiles," the financial identities produced by digital surveillance and used to determine a subject's access to credit are risk profiles which necessarily pre-exist the subjects who are given them. A risk profile is a likelihood of repayment on a hypothetical future loan, a fictional subject-like figure which becomes self-actualizing through the corporate and state authority afforded to it.[79] The risk profile, like Locke's subject of property, claims to pre-exist social categories which it in fact reproduces.[80] An example is the reproduction of race through subprime mortgage lending: black and Hispanic lenders (women in particular) deemed high risk had minimal access to credit. The only loans they could access were therefore made to them on terms which charged higher rates of interest to p. 542 ↳ cover the lenders' increased risk, and fined them significant fees for late payments. For most, these "subprime" loans became impossible to repay, leading to their mass dispossession and to the reclassification of black and Hispanic populations as high risk.[81]

The evaporation of ownership, and with it the traditional subject of property could, in theory, be something to celebrate from a social justice perspective. The Lockean and Hegelian subject of property to which Maurer refers has long been critiqued for being based on racialized and gendered assumptions about who is capable of being a subject. Those assumptions have in turn provided conceptual justifications for white supremacist and patriarchal property practices including colonialism, slavery, and coverture. But the new forms of ownership being generated by finance are derivative of property's past. Even as commercial lawyers seek the abandonment of property as a concept, and risk profiles and abstract instruments replace subjects and objects of property, whiteness is again reconstituted as a category of power. The factors and surveillance techniques used to calculate risk profiles are already racialized, meaning whiteness contributes to a low-risk profile, better access to credit on favorable terms, and thus increased chances of having material security.

As the "subject of property" has changed over the twentieth- and twenty-first-centuries, so too has the "object of property." As mentioned above, there are now new kinds of financial assets that can be owned, assets which are difficult to define and which have their value dependent on future transactions. The reality that much land is owned subject to mortgage not only diminishes the ideal of a subject in control; it also diminishes the ideal of a definable object: what is it that heavily mortgaged homeowners, many of whom have conditions in their mortgage restricting how they can use their homes, actually "own"?

Even for subjects who own title to land free of a mortgage, various legal developments over the past century put into question what land title amounts to in a practical sense. States tend to reserve the right to the fossil fuels that lie below the surface of title,[82] and courts grant owners only so much airspace on their land "as is necessary for the reasonable enjoyment" of it, usually around 200 meters above roof level.[83] With drone activity of various kinds and underground hydraulic fracturing for the mining of fossil fuels both expanding as industries, there is an increasing likelihood that title-holders will be affected by these practices whether they consent to them or not. As Emma Waring has shown, in the English context legal changes leading up to the criminalization of squatting in 2002 bolstered an absolutist concept of registered title to land, yet the actual content of that title—that is, the enforceable rights it gives owners over the land—has been progressively eroded through other legislation.[84] While the registered title and ↳ thus the key to resale value is heavily protected, control over the land for owners who want to physically use it has, in some significant ways, been diminished.

While this era of financialization is causing traditional understandings of ownership to be challenged, ownership itself is also a state of being which is increasingly unattainable for many subjects. In relation to land, forms of tenure inferior to individual freehold title are increasing in incidence and in practical relevance. With urban density reaching new levels in many cities, "strata title," "condominium," and other forms of moderated freehold title are increasingly common,[85] and the design and administration of housing for those who cannot afford either to buy or to pay market rent has become an urgent issue.[86] These forms of tenure involve varying levels of shared control which must be managed collectively by owners, and which defy Lockean and Hegelian models of the property-owning subject in full control of his object. In the UK, private renting has more than doubled since 2000, as housing prices prohibit first-time buyers from purchasing homes, and state-subsidized council housing has also been significantly reduced.[87] In the USA, a significant number of the houses foreclosed in the recent crisis are now rental properties owned by absentee investor landlords.[88] The UN Special Rapporteur on Adequate Housing has stated that "we are today in the grip of a global tenure insecurity crisis"[89] as people around the world increasingly lack control over the places where they live.

29.4 Beyond the Subject and Object: The Spaces Where Property Happens

With property changing in formation to the extent that analyses based on subjects controlling objects are losing their purchase, alternative approaches are needed. One approach is to shift focus from the subject and object of property and onto the spaces ↳ through which property is constituted.[90] Legal geographers argue that law, space, and identity are interconnected to the extent that they are constitutive of each other, an interconnection that is relevant for understanding property.[91]

Davina Cooper offers a spatial understanding of property in her empirical-based study of property practices at an alternative boarding school in England.[92] Cooper describes property practices as involving a number of intersecting dimensions, of which belonging is the most important. Cooper considers belonging in two ways: first, the relationship whereby an object, space, or rights over it belong to a subject ("subject-object," "having," or "ownership"), and second, the constitutive relationship of part to whole whereby attributes, qualities, or characteristics belong to a thing or a subject ("part-whole," "being," or "membership").[93] Both types of belonging implicate social relations and networks that extend beyond the immediate subject and object of property; property is instead understood as "a set of networked relations in which the subject is embedded."[94]

Cooper's analysis of property is spatial in that it focuses on the networks in which the subject is embedded rather than primarily on the subject herself. Networks are necessarily spatial; as particular arrangements of intersecting forces or things that necessarily extend beyond the subject, different networks (whether they be social, conceptual or physical) constitute the reference systems through which we locate ourselves in the world. Focusing on these networked relations, I have argued that in order to form property, they must not only include a relation of belonging between either subject and object or part and whole but must also be structured in such a way that that relation of belonging is conceptually, socially, and physically supported or "held up."[95] That is, the set of networked relations that Cooper describes must form a space that holds up the relation of belonging. My understanding of space is informed by geographer Doreen Massey, whose work refutes associations between space and the fixation of meaning and instead conceptualizes space as the product of inter-relations.[96] Space is therefore dynamic, multiplicitous, and always under construction.

Using this analysis of property as spatially contingent belonging, whiteness can be understood as property in the sense that whiteness belongs to the white subject (subject-object belonging/having/ownership), and also in the sense that the white subject belongs to the complex relations and networks that form whiteness (part-whole belonging/being/membership). This analysis suggests the intertwining of questions of ownership and membership or having and being, as well as the crucial role which space—in all its p. 545 networked and relational multiplicity—plays in constituting property.[97] In policy terms, ↳ this analysis means that if the normative goal is to challenge the way whiteness (or another identity category) operates as a structure of exploitation and oppression, then it is the relations and networks that form whiteness which must be undermined rather than the narrower project of liberating or disciplining the individual subjects who belong to them. The whole and the part constitute each other, as do the subject and object, and property is understood as a malleable spatial formation.

In her recent work, Margaret Davies draws on actor-network theory to highlight the co-constitutive nature of property relations and to challenge property's distinction between subject and object.[98] Davies argues that contrary to traditional Anglo-European theories of property, in reality rational human subjects do not simply control lifeless objects; rather, objects have their own vitality and themselves control and constitute subjects. The material reality of life on earth is that as humans, we are interconnected with and dependent upon the environments in which we live and of which we are also a constituent part. Davies argues that what is required is "a non-exploitative understanding of property, one where objects are not categorized according to who owns them but in a way which recognizes their significance in an ecology of both living and non-living things."[99] Such an understanding is increasingly necessary as the effects of climate change destroy the Lockean fallacy that land is an inert object waiting to be enclosed and cultivated by white men.

The understanding Davies puts forward is radically different from traditional Anglo-European understandings of property and the extractive and exploitative practices that these understandings have fostered. It is, however, consistent with many Indigenous philosophies and practices.[100] As dominant theories of property struggle to maintain relevance in the context of financialization, corporatization, and climate change, it is both politically and practically imperative to turn to different theories of the world, human subjectivity, and ways of being. Anglo-European conceptions of property and their legal manifestations have always been met with resistance, notably from the various nations and cultures categorized as Indigenous. "Indigenous" is itself a generalizing colonial term: no Gurindji, Arrente, or Mohawk people defined themselves as "Indigenous" before the imposition of colonial rule,[101] but their precolonial relationship with land and survival of and resistance to colonial property regimes provides them with a shared political identity. Indigenous philosophies include ways of understanding human relationships with land and with non-humans that are radically different from the proprietary understandings discussed above. These philosophies not only challenge ↳ property's distinction between subject and object but also offer world views which elide such categories. Glen Coulthard explains in the context of the Dene nation that in Indigenous place-based perspectives, land is an ontological framework for understanding relationships.

> It is a profound misunderstanding to think of land or place as simply some material object of profound importance to Indigenous cultures (although it is this too); instead, it ought to be understood as a field of 'relationships of things to each other .... [H]umans held certain obligations to the land, animals, plants and lakes in much the same way as we hold obligations to other people.[102]

Although Coulthard is writing here in the past tense, he and other scholars make clear that while Indigenous relationships with land have been violently disrupted by colonial forces, the philosophies and practices which form the basis of those relationships remain alive today.[103] Discussing some of the mistakes made by Australian courts in their interpretation of Aboriginal connections to land, Moreton-Robinson writes that "Indigenous people are the human manifestations of the land and creator beings; they carry title to the land through and on their bodies. … The relationship between people and their country is synonymous and symbiotic."[104] The objectification of land which is necessary for Lockean ownership does not make sense according to such understandings, because land is the framework for life rather than an inanimate object; it is ontologically connected to human "subjects," and cannot be owned by them. Such understandings also require a conception of land as physical, unique, and alive, rather than a dephysicalized abstract entitlement iteratively produced upon registration. And such understandings demand a conception of personhood as ontologically connected to the non-human world, rather than a conception of personhood as calculable through financial risk indicators.

29.5 Conclusion

As well as Indigenous philosophies and practices, there is much to be learned from studying the spaces maintained by other groups that have had to struggle to survive in a system in which they have little to no legal control over land, capital, or other objects,[105] and have not been regarded as proper subjects. Reversing the usual direction of education ↳ by reflecting on what those who signed up for subprime mortgages at the height of the crisis have to teach those now analyzing the crisis aftermath, Sarita See argues that "the contractually illiterate spelled out for all of us what was and is so clearly a systemic hoax."[106] By buying houses with subprime mortgages, these subjects exposed the illusion of the property-owning subject with rights, and showed the devastation that divorcing ownership from control in the context of financialized housing can wreak. Studying a contemporary cultural space of Filipino North America, See shows how subprime debtors have survival strategies that the privileged do not: "It is the illiterates who insist on finding better ways to cohabit and live with one another."[107]

Writing in the South African context, Andre Van der Walt argued that "sometimes we should forget about the big property developments and focus our attention on the squatter huts and slave cottages that also represent powerful and significant property loci."[108] While Indigenous philosophies such as those of the Dene nation provide a basis for rejecting the very concept of property, Van der Walt is arguing for an approach to property which retains it as a concept but with the hope that understanding it differently might allow for it to have unexpected political effects. If, as suggested in section 29.4, property is understood as being dependent not so much on "the subject" but on a set of networked relations in which subjects exist, then there is no reason why that set of networked relations must necessarily hold up relations of belonging that are conservative, exploitative, or oppressive. As Massey has shown, relations, networks, and the spaces they constitute are not fixed in time. The spaces of apartheid survival which Van der Walt describes involve relations of belonging that could be understood as property, as do Aboriginal town camps in Australia, and other sites of survival, resistance, and protest.[109] Perhaps subversive property exists, and new political possibilities lie in producing spaces in which such property occurs.

Where subversive property does exist, it will not only involve political spaces distinct from the white supremacist, capitalist ones which have developed around the Anglo-European conceptions of property traced in this chapter, it will also involve different subjectivities. McClanahan suggests that among young Americans there is “an emergent subjectivity,” one which cannot and will not repay their debts.[110] Such a refusal undermines the premise of the credit economy and carves out a different future. As McClanahan argues, “An economy founded on credit depends on deferring payment into the future, but it depends even more on the premise that those payments will not be deferred forever. To be in debt forever is thus to refuse to be in debt at all.”[111] As the concept of property travels into the twenty-first century, perhaps it will take on new forms through the wisdom and practices of those who have traditionally been deprived of it.

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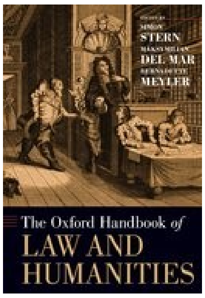

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CHAPTER

30 Intellectual Property's Queer Turn

Andrew Gilden

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Abstract

Intellectual property is getting queerer. Although intellectual property is most often associated with theories of economic rationality or romantic individualism, there are increasingly prominent strands of IP theory that reflect the insights of queer theory. Although IP and queer theory are rarely in direct conversation, this chapter shows several nascent intersections between these two fields, including: the cultural contingency of creativity, the unpredictable trajectories of social regulation, and the co-constitutive nature of intellectual life and material culture. IP theory increasingly understands that the cultural discourse shapes the distribution of wealth, happiness, and political power in the physical world, and vice versa. This chapter emphasizes both the broad sociocultural implications of IP's regulatory interventions and the underappreciated jurisprudential value of queer theory.

Keywords: queer theory, intellectual property, copyright, trademark, patent, sexuality, identity

Subject: Jurisprudence and Philosophy of Law, Law and Society, Intellectual Property Law, Law

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INTELLECTUAL property (IP) and queer theory may seem like strange bedfellows. Queer theory typically is associated with questions of sexuality, gender norms, and the performative nature of identity, while IP is typically associated with control over markets and incentivizing large-scale, typically corporately owned, creativity and innovation. Queer theory prizes indeterminacy, contingency, and social construction, while IP emphasizes stability, predictability, and the steady march toward "progress." Yet queer theory both holds useful explanatory power for many contemporary IP disputes and pushes IP scholars to even more deeply interrogate the cultures of creativity and innovation that lie within their jurisdictions. Although queer theory is often about sex, gender, and identity, its insights can be useful in questioning and critiquing ideology more broadly[1]: What are the norms that structure our social order? How do those norms come to be experienced as natural? How can we reveal and dismantle these constructions? A queer theoretic lens on IP provides a framework for understanding the role of IP in the production of our shared cultural norms, and the role of our shared norms in the production of the ideas, texts, and technologies protected by IP.

p. 550 Although neither IP nor queer theory can be collapsed into monolithic ideologies or methodologies, both nonetheless are deeply concerned about the relationship between the tangible and the intangible.[2] Our lived experience consists simultaneously of physical, massed things that we can see, hear, feel, touch, and taste as well as of concepts, ideas, philosophies, beliefs, and other abstractions. Queer theory and, increasingly, IP scholarship understand that the organization of these intangibles can shape the distribution of wealth, happiness, and political power in the physical world. Whose beliefs are recognized and revered, whose intellectual labor is commodified and marketed, and whose conceptions of the good life are met with state-backed punishment combine to shape the tangible, physical layout of our social environment. The regulation of the intangible aspects of culture moves certain physical bodies into certain geographic spaces and certain material objects into the hands of certain groups of people. And these material distributions in turn shape the production of ideas and culture.

Both queer theory and contemporary IP scholarship operate against intellectual traditions that too often sever the realm of the normative from the realm of the material. By overlooking the co-constituting role of material conditions and cultural norms, dominant conceptions of identity, innovation, and authorship all overlook the possibility of realigning systems of power through cultural and ideological intervention. This chapter examines the fusion of the tangible and intangible in both IP and queer theory, and it emphasizes the interplay among bodies, communities, and culture.

IP scholars traditionally divide into two main camps: (1) utilitarians, who emphasize that IP is justifiable (if at all) as an economic incentive to engage in creative/innovative pursuits, with an eye toward efficiency and increased social welfare; and (2) deontologists, who—drawing from Enlightenment philosophies—emphasize the inherent fairness of giving creators control over the fruits of their labor and free will. In recent years, each camp has accused the other of failing to sufficiently ground their claims in empirical evidence and of unduly downplaying a range of other important values, such as free speech and distributive justice.[3]

Against this traditional backdrop, a growing body of recent IP scholarship has increasingly eschewed big,
“top-down” explanatory theories that have dominated IP, and has grounded IP discussions in the needs
and experiences of everyday individuals whose social, cultural, and economic interactions are shaped by the
p. 551 varying presence ↳ and absence of exclusive rights in intellectual goods.[4] Although IP scholarship is almost
never framed in terms of a queer orientation, and only occasionally and hesitantly in terms of broader
postmodern theories,[5] recent shifts in IP scholarship reveal some important linkages between queer
approaches to subjectivity and power and IP’s increasing interest in social norms, dissent, and cultural
transmission. The following sections will sketch out the potential for some queer turns in IP theory.

30.1 Queering Creativity

One of queer theory's main contributions has been to rethink the ways in which sexuality and gender are constituted as foundational human identity categories. Rather than think of sexual orientation or gender identity as, on one hand, the product of either innate genetic makeup or deep-seated psychological characteristics or, on the other, a conscious decision to engage in certain sexual activities, queer interventions largely cast aside the nature/nurture debate to show that identity and culture are mutually constituted. In this formulation, sex and gender are *performative*: they are produced through patterns of activity that become tightly associated with certain social labels.[6] From the moment of birth, human bodies run through a gauntlet of social norms that call those bodies certain things (e.g., "she"), that allow them do certain things (e.g., wear dresses), while exposing them to a tiny sliver of humanity's many different ways of living.[7] Social categories often treated as universal and presocial, such as "woman" or "homosexual," are instead the product of a particular historical, cultural, and political context.[8] Although the body and the identities that attach to it may be experienced as existing prior to and independent of social environments—as universal truths projecting themselves into a particular public sphere—queer scholarship has recognized that social environment and subjectivity are inextricable from each other.[9]

Contemporary IP scholarship also grapples with an intellectual tradition that severs creativity and human p. 552 expression from the social contexts in which they operate. Much ↳ IP theory has critiqued the romantic, classically liberal notion of creativity and authorship—that fully formed individuals act upon the world and make something new out of the raw materials they discover in a proverbial state of nature.[10] In this view, creators may need the law to provide some legal assurances that their labor will not be appropriated without compensation or consent, but they don't need anything else in order to engage in their craft—creativity is purely a "personal reaction of an individual upon nature."[11] IP scholars, even those expressly embracing moral rights theories, recognize the limits of such a romantic view of creativity. Creativity is an inherently social activity; what a creator does is tightly wound up in the domain of culturally available ideas, images, and texts, so any limits on the "raw material" of creativity (whether due to cost, law, or technology) will shape the possibilities of creative expression.[12] Creativity does not exist without culture, and culture is never static, and accordingly IP scholarship now almost universally recognizes that creativity and culture build upon themselves, piecing themselves together as today's creators build off their peers and predecessors to produce tomorrow's cultural landscape.[13]

Although such "postmodern" turns away from the liberal subject are often dismissed among legal theorists for being overly abstract and academic,[14] both of the above scholarly shifts have been accompanied not just by theory and jargon, but also by a pronounced focus on the experiences of individuals actually living with norms of gender and sexuality (in queer theory) and creativity and copying (in IP theory). In the queer p. 553 context, drag ↳ performances,[15] locker rooms,[16] late-night lesbian bars,[17] S&M clubs,[18] and many other venues have been investigated as sites where the traditional social correlations of bodies, desires, kinship, and temporality come apart and new ways of imagining their intersections come to the surface. In the IP context, scholars have studied an incredibly diverse range of creative communities: clowns,[19] fashion designers,[20] stand-up comedians,[21] chefs,[22] open source programmers,[23] craft brewers,[24] roller derby contestants,[25] and (again!) drag queens.[26] These studies eschew grand explanatory theories of creativity and undermine the notion that encouraging creativity can ever be reduced to economic incentives.[27] Instead, what emerges from these studies is that creativity is shaped by the very particular norms of the social environment in which they operate. Social norms (e.g., against copying jokes) can supplement or substitute for formal IP laws in regulating innovation,[28] or the sense of belonging (e.g., to an open source community) can incentivize creative activities without any promise of financial reward.[29] One's identity as a clown or chef or derby girl is contingent upon a sense of being part of a particular social group and the incorporation of such norms into the creative process. IP scholarship shows that creative identity is the product of a complex cultural landscape marked by particular social expectations about how one should or shouldn't behave. p. 554 ↳ Just as "one is not born, but rather becomes, a woman,"[30] IP scholars have shown that one is not born, but rather becomes, a clown, chef, or derby girl.

These scholarly insights can have important implications for regulatory responses in each field. For law and sexuality, queer insights emphasize that sexual justice is not just about prohibiting the state and private businesses from expressly discriminating against people who already identify as lesbian, gay, bisexual, or any other sexual orientation.[31] Instead, sexual identity development requires actual, achievable opportunities for individuals to interact with others, experiment with desires, and embody the categories they may ultimately embrace.[32] For IP, fostering creativity is not just about providing financial incentives to get people off their sofas but about facilitating the communities in which creativity takes place. Actual creators often want recognition and belonging—which are generally dismissed by positive IP law—and need access to a robust domain of cultural resources—which IP laws often directly foreclose. The liberal self comes into the world with all the resources they need; the situated subject feeds off the opportunities available to them.[33]

30.2 IP and the Repressive Hypothesis

IP scholarship, however, too often stops the analysis there. Authorship is cumulative and accretive, so we should hesitate to empower any single creator to seriously and unilaterally constrain future creators from adding their own contribution. The widely embraced takeaway from understanding that creativity is a social activity is to recognize that there are serious costs associated with IP protections—the stronger and broader the protections for creative works, popular brands, or new technology, the harder it will be for future creators to add to, comment on, and build communities around what has come before. IP's mission accordingly should be to regulate creative communities by ensuring that they have access to a ready supply of creative inputs while giving each iteration of creativity some potential for economic reward.

But IP is regulatory in a more pervasive sense. IP is not just about setting a level of legal and cultural constraint that optimizes the set of options available to future creators[34]; p. 555 ↳ instead, the nature, scope, and severity of IP constraints will foster different types of creativity that are produced and consumed by different types of people. Some people will respond to IP's constraints by cleverly working around them; others will simply pay for permission to do what they wish; others will do what they want, IP laws be damned; and others will simply give up. These responses are highly unlikely to be random; instead, the ability to work around IP tracks one's practical ability to live with the financial consequences of infringement and their ability to assume a cultural role that brings some degree of prestige.[35] IP's prohibitions and permissions channel consumers of IP into distinct categories—e.g., artists, innovators, users, thieves—that come to occupy a legal hierarchy of creativity with implications for subjectivity far outside the immediate domain of producing and consuming discrete works.[36] To the extent IP regulates creativity, creativity in turn regulates well beyond what kinds of books, songs, and software ultimately make their way into the hands of the public.

To spell out this relationship between IP's constraints and the varied cultural responses to it, it may be useful to turn to Foucault's analogous insights on juridical power in *History of Sexuality Vol. 1.* In Foucault's formulation of the "repressive hypothesis," sexuality isn't regulated and repressed by a set of legal prohibitions on particular sexual acts; instead, the response to such prohibitions is a proliferation of categories and experiences that channel individuals into different, often hierarchically arranged, social spheres. The marginalization, for example, of same-sex sexuality was as much a product of the linguistic birth of the term "homosexual" and the proliferation of medical knowledge around its deviancy as it was a product of the direct criminalization of sodomy.[37] The internalization of social categories of sexuality—and the norms accompanying them—in many ways produced modern LGBT identity, with its simultaneous connotations of deviancy, protest, and pride.[38] Sexual liberation, within this framework, is as much a question of shifting discourse as it is about reforming laws. Foucault's insight was to recognize that shared knowledge and cultural discourse were the key regulatory apparatuses in the field of sexuality, and his work dismantled the neat equation between subjugation and legal constraint.

Following Foucault, one could say that IP doesn't repress creativity, instead, it produces a repertoire of creative categories—authorship, invention, originality, piracy, transformation—that sort people and groups according to their respective abilities to inhabit each of them. As Madhavi Sunder has emphasized, "Intellectual property does not merely incentivize and reward creators; it structures cultural and social relations."[39] Creative culture is inextricable from questions of social identity, including the questions of p. 556 gender and sexual identity animating much of queer theory. IP scholarship's recent ↳ empirical turn may be primarily concerned with the role of social norms vis-à-vis positive law, but how the positive law responds to such norms will inevitably have a material impact on how each field produces its own vision of gender, sexuality, race, ability, and other axes of social hierarchy. For example, several of the fields studied by IP scholars, including cuisine, stand-up comedy, and craft brewing, have been characterized as having some element of an "old boys club," and to the extent that the positive law is replaced by social norms, social norms can perpetuate the gendered terms of entry.[40] Decisions about whether or not to "regulate" a community through IP is not simply about deciding whether we want more or less output from that community but also about whether and how to supplement internal regulatory norms that shape who can meaningfully participate. Roller derby leagues often serve as lesbian social networks, and drag culture often anchors queer social and political circles. IP interventions into these spaces might appear to affect only the precise way that derby girls name themselves or drag queens choose which acts to perform, but these decisions are important components of activities that are often integral to the formation of gay and lesbian subjectivity.[41]

IP may want to be laser-focused on creative production, but creative production ripples outward in complex, yet deeply important ways. Sonia Katyal has recently urged an analogy between gender identity and intellectual property to advance a more robust legal conception of the relationship between physical sex and socially constructed gender: "[T]he relationship between property and intellectual property tracks a similar connection between sex and gender. If assigned sex operates as a tangible marker of identity within the law, then gender operates as an intangible overlay, a fluid performance over the seemingly tangible 'property' of assigned sex."[42]

Katyal argues that intellectual property is to property as gender is to sex, and in doing so she emphasizes that the domains of the physical and tangible—property and sex—are shaped by the legal regulation of the intangible—IP and gender.[43] Katyal uses this analogy in the service of more expansive, performative understandings of gender, but her analogy can also be used to broaden the cultural significance of IP. The regulation of the intangible through IP channels certain forms of human labor, creativity, and innovation into mainstream public recognition and compensation, and other forms into either the margins or the public domain, where they can serve as the freely available building blocks for others to appropriate.

IP laws, within Katyal's framework, might accordingly provide an "intangible overlay" to the organization p. 557 and commercialization of human capital and material wealth in ↳ creative fields. Numerous scholars have critiqued the appropriation of cultural and technological contributions made by people of color, sexual minorities, women, and the global poor. For example, medical knowledge in developing nations is modestly protected as "traditional knowledge" and often freely appropriated and patented by Western pharma companies[44]; songs written by black musicians are co-opted by white performers and transformed into worldwide hits[45]; queer performance art is used to spice up the work of cultural icons like Beyoncé.[46] IP is in many ways the legal interface between the "abstract" realms of the cultural and discursive and the very material realms of race, gender, and sexual inequality. It denotes certain cultural contributions as legally tied to particular individuals and allows those individuals to demand recognition or compensation as their work, words, voice, images, and ideas begin to circulate.[47] On the other hand, where IP doesn't conceptualize certain activities as proprietary, it may serve to perpetuate the tangible consequences of social hierarchies—certain people are up for grabs by those with greater power.[48]

IP's perpetuation of certain patterns of production signals a recursive, performative aspect of the relationship between law and identity.[49] Certain individuals engage in certain activities that are repeatedly channeled into and out of certain cultural spheres, which then feed back into the subjective experience of labor, creativity, and invention.[50] As this channeling displays ongoing patterns of skin color, anatomy, dress, and sexual desire, individuals who have or develop those traits internalize their social roles in accordance with the perceived accessibility of different cultural spaces. Queer theory is deeply attuned to this looping performativity of culture—when certain people are only legible in certain contexts, these limits loop back into social identity in countless material ways. As much as we may experience the world as picking up where those before us have left off and making our own way, our identities reflect an ongoing interaction p. 558 with the symbolic realm that both precedes and postdates us, and empties back into our ↳ subjective experience of moving through the world. IP laws shape the possibilities of subjectivity—they make certain discursive forms more or less accessible and certain opportunities for material betterment more or less achievable.[51]

Seen through the lens of queer performativity, IP's core constitutional mission of promoting "progress" can't be understood as simply a forward-moving march toward a world of greater access to more and better innovation.[52] Culture and creativity may appear to march forward in a linear fashion as creators are born and die, and their intellectual creations proceed through a fixed legal timeline of protection.[53] Yet the material conditions before and during the creative process, and the anticipated material conditions that will follow, shape how culture is experienced. A substantial body of queer scholarship has pushed back against a forward-moving, goal-oriented, and ultimately rosy notion of the future; utopian notions of the future pull our psychic attention away from the material conditions of the present (and both the pleasures and pain experienced within it).[54] Lee Edelman, for example, polemically critiques the "culture of the child," whereby imperatives of reproduction and domesticity are promoted within LGBT advocacy at the expense of both embodied sexual pleasure and the concrete pains of living on the social margins (e.g., with respect to healthcare and the criminal justice system). Queer theory pushes back against the often-shared instinct that if we are going to make the world a better place for our children, we can't focus too much on our own needs and desires. If we are so focused on the future, we miss opportunities to engage with—and indeed we capitulate to—the social norms that continue to place marginalized people at the margins.

This critique maps quite neatly onto the temporal orientation of IP—IP's primary concern is with creating an artistic and technological environment for the sake of future generations who will benefit from our p. 559 contributions today,[55] and if today's contributors ↳ are denied the legal protections they seek, this is just the cost that must be borne for the sake of our children.[56] Putative IP owners seeking recognition or compensation for the use of their work may be dismissed as selfishly putting their own interests over the superseding cultural imperative of future generations, but putting off the needs and experience of the present may perpetuate the cycles of social hierarchy that will continue to be internalized by those same imagined future generations.

As much as a set of laws aimed at incentivizing innovation celebrates the potential for human culture to move forward, queer theory emphasizes the trenchantly cyclical nature of embodied subjectivity. IP scholarship is increasingly attentive to the interconnected and iterative nature of creativity, but its retreat from the romantic creator often does not appreciate just how difficult it is for creators to extract themselves from the social norms that limit opportunities to obtain the material benefits that IP promises.

30.3 Copies That Matter

IP theory arguably already contains many of the conceptual tools needed to more fully integrate social norms into its constructions of identity, invention, and authorship. Both queer theory and IP recognize that culture exists both in the realm of abstraction and in the inscription of the abstract onto the material. Queer theory has shown that cultural norms—particularly surrounding sex and gender—are so powerful because they seem to emanate *from* the body. For example, when a baby is born, its sex is "revealed" as either male or female, and this truth of sex is written upon the child's naked body. But what's really happening in these moments is that a newborn child has entered a process of *signification* in which certain bodies that have certain characteristics are repeatedly assigned particular labels that come to correlate with particular distinguishing traits.[57] If we truly wish to dislodge patriarchy's hold on culture, it is crucial to see that the body itself is a site of social inscription of gender and sexual norms. To intervene, reconfigure, or reshape these norms, we need to present a more complex set of possibilities for the p. 560 ↳ body, to expose the body as a contested site for normative behavior. Culture is not just about abstract norms experienced by bodies; it's about the process of transmuting those norms *into* bodies.

IP laws are highly sensitive to processes of cultural inscription, to the distinction between the normative and the material. It even has a term to encompass inscription of the abstract into the material: "fixation." Under copyright law, rights subsist in "original works of authorship fixed in any tangible medium of expression."[58] Copyright's unit of protection is "the work," an abstract creation that is given legal recognition only upon the moment that it descends into some tangible medium from which it can be directly or indirectly experienced using any of the human senses. Patent law also draws a distinction between when the inventor came up with an ultimately patentable idea and when the inventor "reduced it to practice"—made it in some way usable within the material world.[59] As much as IP is about rights in the *intangible*, IP laws are about rights in intangibles that have transmuted into material objects.[60]

And IP laws recognize that it is at these moments of fixation, and re-fixation, when both the power and vulnerabilities of cultural interchange come into play. Copyright law protects primarily against the unauthorized creation of "copies"—*new* fixations of intangibles in different tangible mediums; patent law protects against the making, using, and selling of an invention—something commodifiable and transferrable within a market. IP gives rights in the process of fixation because this is the point of cultural engagement with the intangible; the material object is what circulates and is consumed. It is the opportunity for profit and for protest.

Most IP scholars, at least implicitly, get this. If Western legal systems value free expression, political speech, and cultural discourse, they cannot allow a single entity full control over the inscription of meaning into tangible objects, or stop the meaning extracted from those objects from being re-inscribed into other objects.[61] The relationship between discourse and text is inherently unstable, and IP laws—in particular copyright and trademark—increasingly allow space for creators to destabilize texts, whether through parody, critique, or certain forms of remix. Just as queer theorists have embraced drag culture for revealing the inherent arbitrariness of gendered norms through its mashing up of bodies and behaviors, IP theorists repeatedly embrace cultural mash-ups that reveal the contingent nature of race, gender, and sexual norms built into popular texts p. 561 ↳ and brands.[62] As Laura Heymann has demonstrated, the power of fixation—the ability to take objects in the world and turn them into the subjects of photos, film, books, and music—is the power to create meaning within culture, and this ability to wield fixation often trumps the ability of individuals to shape their own public representation.[63] Fixation is a moment of contestation; it is both an assertion of dominance and an opportunity for resistance. If cultural norms produce subjectivity, and culture operates through the circulation of text, then it is at the moment of inscription when hierarchy can be disrupted.

Copies, in other words, can queer. Indeed, IP case law is replete with examples of works that reinterpret and challenge gender and sexual norms built into popular cultural works—some examples include Barbies in a blender,[64] Aqua's "Barbie World,"[65] a homosexual Ashley Wilkes,[66] a pornographic Mickey Mouse.[67] IP scholars also have given extensive attention to fan fiction and other forms of noncommercial remixes that rework the gender, race, and sexuality of famous characters. Hermione Grainger as protagonist of the Harry Potter universe; the timeless romance of Kirk and Spock; the timeless romance of Frodo and Sam.[68] These examples are held out as prime examples of fair use; they infuse previously distributed copies of works with "new expression, meaning, or message."[69] They take a copy, alter it in a particular way, and the new copy "transforms" or multiplies the cultural meaning associated with the earlier work.

This portability of meaning provides a key link between the queer and IP scholarly projects. Social norms are powerful but inherently instable, and this instability shines through precisely in those moments when particular traits and behaviors appear in social contexts where they are least expected. Margaret Davies intriguingly draws the connection between subversion and contextual shifts in both sexuality and property law:

> [T]he subversive potential of phallic imagery lies in the fact that, as property, the phallus is subject to appropriation or transfer, and therefore is capable of reappearing in places—such as within the structure of lesbian sexuality—where it does not conventionally belong. The reappearance of the p. 562 signifier of masculinity in an improper ↳ place emphasizes its contingency and the contingency of the power relations it brings. *We could even say that the phallus is like intellectual property*, which obtains its economic value by a legal fiction restricting its use and therefore creating an artificial scarcity .... Returning an object of intellectual property to the commons would devalue it, and undermine or even destroy its own status as property.[70]

Dominant social norms with respect to gender, race, family, and sexuality are deeply embedded in cultural artifacts like Barbie, Mickey, and *Gone with the Wind*, and strong IP protections for those works keep the cultural associations with those works firmly established as the "official" configuration of sex, gender, and commerce. Queer theory recognizes that these configurations are constantly contested by the curious children, engaged fans, and artists who experiment with them. IP theorists recognize that the law can facilitate these contestations and accordingly help dislodge the social norms built into the propertied artifact.

At the same time, a mere loosening of historic legal restrictions should not be equated with a revolutionary dislodging of social hierarchies. Queer theorists have repeatedly pushed back against the notion that expanding legal protections for LGBT people equates to sexual liberation. Just because those individuals typically associated with oppression are being less oppressed, for example, as a result of expanded access to marriage or the military, does not mean that the social values underlying those institutions have been fundamentally dislodged. Milestone LGBT rights decisions like *Lawrence v. Texas* and *Obergefell v. Hodges* have been criticized for their domesticating impulse,[71] and LGBT-friendly laws have been chastised for "pink-washing" human rights abuses against other minorities.[72]

A similar caution might be useful in the IP context. As much as reworking popular works can dislodge the norms embedded in those works, the same legal mechanisms that allow such reworking—most notably fair use—can be co-opted by wealthy, famous appropriators who build off the work of poorer, queerer, or otherwise marginalized creators.[73] When Jeff Koons, Richard Prince, Beyoncé, or Green Day relies on fair use to excuse nonpayment or non-recognition of appropriated work, the implications of these fixations may be p. 563 quite different than when these artists' work is recontextualized by ↳ lesser-known creators. Every "new" work may to some degree be a transformation of something that came before, but not all transformation is necessarily transformative in a politically meaningful way.[74] The challenge for IP theory is to create space for the recoding of culture while at the same time remaining attuned to the slipperiness of power and the ability of social norms to persevere and adapt.

30.4 IP's Queer Future?

Creativity is situated not just within creative communities but within a broader cultural context. Accordingly, questions of power and agency within creative fields cannot be neatly disentangled from broader cultural questions of subjectivity. IP scholarship has been greatly enriched by empirical projects that have looked closely at the particularized needs, interests, and experiences of actual creators; romanticized individualism has given way to a much more complicated and socially enmeshed creative subject. The challenge going forward, then, is to move beyond grand theories rooted in liberal individualism and to develop a world view that places creativity and innovation within the broader cultural landscape in which such endeavors take place.[75] IP's regulation of expression and innovation shapes opportunities for play and experimentation, and the differentiated availability of such opportunities feeds into experiences of inequality more generally. IP needs theories that are both expansive in terms of their values but nonetheless rooted in "specific lived experience of distinct communities."[76]

Accordingly, a queer theoretic framing of IP raises the stakes for IP regulation—it implicates questions of race, gender, and sexuality often understood as peripheral to the field—but it doesn't necessarily push formal IP doctrines in any one direction. On the one hand, strict control over public representations of key cultural works risks centralizing important discursive moments in the hands of a few property owners; various kinds of outlaws may push back against any assertions of cultural hegemony, but the result nonetheless will be a highly stratified creative culture. On the other hand, power also inheres in the ability to fix works in material objects, and IP laws often have the effect of blessing certain forms of fixation by certain types of creators and not others. This can occur both at the front end—in deciding whose work is worth legal recognition and protection—and on the back end—whose recoding and re-fixations are infringing and whose are not.[77] In other words, a *contraction* of IP can also result in the hierarchical shaping of creative cultures. "[L]egal rights regulate rather than simply liberate those ↳ who are subordinated; rights produce as well as protect their subjects."[78] The challenge for IP is not just to find the right balance of constraints on downstream creators; power is slippery and adaptive no matter the "level." IP scholarship and jurisprudence must develop new ways of speaking about creation and appropriation that are attuned to the more complex workings of power operating below the surface.

If IP *is* going to promote some meaningful notion of "progress," it accordingly needs to broaden its field of focus. IP scholars and jurists often insist that IP is narrowly about market-oriented financial incentives to create, but creation means cultural participation, and cultural participation is inextricable from identity. Accordingly, any legal interventions which shape opportunities for cultural participation will *have* to be about more than just economic rewards—they also have to be about the psychic and subjective dimensions of culture.

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1 See, e.g., Martha T. McCluskey, “How Queer Theory Makes Neoliberalism Sexy,” in *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations,* ed. Martha A. Fineman, Jack E. Jackson, and Adam P. Romero (Burlington. U.K.: Ashgate, 2009), 115–134, 125 (“[Q]ueer theory joins a wider body of legal realist and critical (including feminist) work devoted to digging beneath stated norms and rules to unearth the raw and messy dynamics of power.”); Adam P. Romero, “Methodological Descriptions: Feminist and Queer Legal Theories,” in *Feminist and Queer Legal Theory*, ed. Fineman, Jackson, and Romero, 179–198, 192 (“Queer … positions in opposition to, or at least at odds with, that which is normal, dominant or hegemonic, but there is nothing to which ‘queer’ necessarily refers.”); Richard Thompson Ford, “What’s Queer About Race?,” in *After Sex? On Writing Since Queer Theory*, ed. Janet Halley and Andrew Parker (Durham, NC: Duke University Press, 2011), 121–129, 123 (“So *queer* denotes not an identity but instead a political and existential stance, an ideological commitment, a *decision* to live outside some social norm or other.”).

2 On the relationship between physicalized and “dephysicalized” conceptions of property law more generally, see Sarah Keenan’s chapter, “Property: Changing Formations of Having and Being,” in this volume. On the relationship between materiality, time, and cultural history, see Christopher Tomlins’s chapter, “Materialism and Legal Historiography, From Bachelard to Benjamin,” in this volume.

3 See, e.g., Mark A. Lemley, “Faith-Based Intellectual Property,” *UCLA Law Review* 62 (2015): 1328–1346; Robert Merges, “Against Utilitarian Fundamentalism,” *St. John’s Law Review* 90 (2016): 681–709; Stephanie Plamondon Bair, “Rational Faith: The Utility of Fairness in Copyright,” *Boston University Law Review* 97 (2017): 1487–1532; Brian Frye, “Machiavellian Intellectual Property,” *University of Pittsburgh Law Review* 78 (2016): 1–15.

4 See, e.g., Julie E. Cohen, *Configuring the Networked Self* (New Haven, CT: Yale University Press, 2011); Madhavi Sunder,

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5 Peter Jaszi, “Is There Such a Thing as Postmodern Copyright,” *Tulane Journal of Technology & Intellectual Property* 12 (2009): 105–122; Rosemary J. Coombe, “Author/izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders,” *Cardozo Arts & Entertainment Law Journal* 10 (1991): 365–396.

6 See Andrew Gilden. “Copyright Essentialism and the Performativity of Remedies,” *William & Mary Law Review* 54 (2012): 1123–1184.

7 See Judith Butler, *Gender Trouble* (New York: Routledge, 1990).

8 See Eve K. Sedgwick, *Epistemology of the Closet* (Berkeley: University of California Press, 1990).

9 Judith Butler, *Bodies That Matter: On The Discursive Limits of “Sex”* (New York: Routledge, 1993), 5 (“But this sex posited as prior to construction will, by virtue of being posited, become the effect of that very positing”).

10 See, e.g., Jessica Litman, “The Public Domain,” *Emory Law Journal* 39 (1990): 965–1024, 965 (“Our copyright law is based on the charming notion that authors create something from nothing, that works owe their origin to the authors who produce them.”); Robert H. Rotstein, “Beyond Metaphor: Copyright Infringement and the Fiction of the Work,” *Chicago-Kent Law Review* 68 (1993): 725–804, 756 (“‘It is hardly possible to accept a critical view which … imagines that a ‘creative’ poet sits with a pencil and some blank paper and eventually produces a new poem in a special act of creation *ex nihilo*.’”) (quoting Northrop Frye, *The Anatomy of Criticism: Four Essays* (Princeton, N.J.: Princeton University Press, 1957), 97); Mark A. Lemley, “Book Review, Romantic Authorship and the Rhetoric of Property,” *Texas Law Review* 75 (1997): 873–906; Simon Stern, “Copyright, Originality, and the Public Domain in Eighteenth-Century England,” in *Originality and Intellectual Property in the French and English Enlightenment*, ed. Reginald McGinnis (New York: Routledge, 2008), 85–117; Peter Jaszi, “On the Author Effect: Contemporary Copyright and Collective Creativity,” in *The Construction Of Authorship: Textual Appropriation In Law and Literature*, ed. Martha Woodmansee and Peter Jaszi (Durham, NC: Duke University Press, 1994), 29–56.

11 Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903).

12 See Andrew Gilden, “Raw Materials and the Creative Process,” *Georgetown Law Journal* 104 (2016): 355–412, 364 (“By framing copyrighted works as raw materials, scholars emphasize the costs that copyright imposes on future cultural participants and recognize that the publication of a book, movie, song, or photograph is just one step in an ongoing process of cultural activity.”).

13 See generally Julie Cohen, “Creativity and Culture in Copyright Theory,” *UC Davis Law Review* 40 (2007): 1151–1206; Carys Craig, *Copyright, Communication, and Culture: Towards a Relational Theory Copyright Law* (Northampton, U.K.: Edward Elgar, 2011).

14 See Cohen, *Configuring the Networked Self*; Janet Halley and Andrew Parker, “Introduction,” in *After Sex? On Writing Since Queer Theory*, ed. Janet Halley and Andrew Parker (Durham, NC: Duke University Press, 2011).

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16 Heidi Eng, “Queer Athletes and Queering in Sport,” in *Sport, Sexualities and Queer/Theory*, ed. Jayne Caudwell (London: Routledge, 2006), 49–61.

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26 Eden Sarid, “Don’t Be a Drag, Just Be a Queen-How Drag Queens Protect their Intellectual Property without Law,” *FIU Law Review* 10 (2014): 133–182.

27 See Jessica Silbey, *The Eureka Myth* (Palo Alto, CA: Stanford University Press, 2014).

28 For example, social opprobrium can serve the same functional role as a damages lawsuit when a stand-up comedian uses another's jokes without permission. See Oliar and Sprigman, "There's No Free Laugh (Anymore)."

29 Betsy Rosenblatt, "Belonging as Intellectual Creation," *Missouri Law Review* 82 (2017): 91–132.

30 See Butler, *Gender Trouble*, 11 (quoting Simone de Beauvoir, *The Second Sex* (1949)).

31 Laurie Kepros, "Queer Theory: Weed or Seed in the Garden of Legal Theory?," *Law & Sexuality* 9 (1999): 279–310, 284 ("Queer theory … is not concerned directly with … equality. Queer theory focuses on the manner in which heterosexuality has, silently but saliently, maintained in itself as a hidden yet powerfully privileged norm.").

32 Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Durham, NC: Duke University Press, 2015); see also, e.g., Andrew Gilden, "Cyberbullying and the Innocence Narrative," *Harvard Civil Rights-Civil Liberties Law Review* 48 (2013): 357–408.

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34 See Joseph Fishman, "Creating Around Copyright," *Harvard Law Review* 128 (2015): 1333–1404.

35 See Rebecca Tushnet, "Free to Be You and Me? Copyright and Constraint," *Harvard Law Review Forum* 128 (2015): 125–136.

36 See James Meese, *Authors, Users, and Pirates: Copyright Law and Subjectivity* (Cambridge, MA: MIT Press, 2018).

37 See Noa Ben-Asher's chapter, "Laws of Sex, Changed," in this volume.

38 See also Judith Butler, *The Psychic Life of Power* (Palo Alto, CA: Stanford University Press, 1997).

39 Sunder, *From Goods to a Good Life*.

40 See Stephanie Bair and Laura Pedraza-Fariña, "Anti-Innovation Norms," *Northwestern Law Review* 112 (2017): 1069–1136.

41 See generally Rosemary Coombe, *The Cultural Life of Intellectual Properties* (Durham, NC: Duke University Press, 1998).

42 Sonia Katyal, "The *Numerus Clausus* of Sex," *University of Chicago Law Review* 84 (2017): 389–494.

43 Ibid., 435 ("[T]he performative dimensions of gender suggest that, instead of thinking of gender as a type of fixed identity, one should view it as more akin to intellectual property—permeable, unfixed, malleable, and ultimately expressive.").

44 See Madhavi Sunder, "The Invention of Traditional Knowledge," *Law and Contemporary Problems* 70 (2007): 97–124.

45 See generally Anjali Vats and Deidre A. Keller, "Critical Race IP," *Cardozo Arts & Entertainment Law Journal* 36 (2018): 735–795.

46 See Estate of Barré v. Carter, 272 F. Supp. 3d 906 (E.D. La. 2017).

47 See Justin Hughes and Robert P. Merges, "Copyright and Distributive Justice," *Notre Dame Law Review* 92 (2016): 513–578, 516 (arguing that "copyright in its current form is a powerful tool to empower creative individuals economically").

48 See Gilden, "Raw Materials"; see also Dan L. Burk, "Feminism and Dualism in Intellectual Property," *American University Journal of Gender, Social Policy, and the Law* 15 (2007): 183–206, 202 ("It may be those entities already endowed with the greatest resources that are best positioned to take advantage of such freely available resources.").

49 See Judith Butler, *Excitable Speech: A Politics of The Performative* (New York: Routledge, 1997), 128 (observing that the idea that censorship produces speech inverts the "temporal relation" typical of the conventional view of adjudication, and arguing that the judicial act of censorship produces the obscene speech it purports to punish).

50 Cf. Katyal, "*Numerus Clausus*," 439 (suggesting "a need to revisit and examine the complex codes and norms (legal, technological, cultural) that help us contextualize meaning through a focus on the material body and its performing potential").

51 Sonia K. Katyal, "Semiotic Disobedience," *Washington University Law Review* 84 (2006): 489–572, 497 ("[Intellectual property law] enables certain types of legal and illegal dissent, conferring legitimacy on some types of speech through the prism of fair use, but often excluding other types of expression from protection.").

52 See Margaret Chon, "Postmodern 'Progress': Reconsidering the Copyright and Patent Power," *DePaul Law Review* 43 (1993): 97–146.

53 See Andrew Gilden, "Life, Death, Public Domain," *George Mason Law Review* 22 (2014): 13–62.

54 See, e.g., Elizabeth Grosz, *Time Travels: Feminism, Nature, Power* (Durham, NC: Duke University Press, 2005), 5 ("[T]emporality and the forward movement of time are … relentlessly at work in all those social and political practices … that attempt to ameliorate existing conditions or compensate for past ones."); José Esteban Muñoz, *Cruising Utopia: The Then and There of Queer Futurity* (New York: New York University Press, 2009), 22 ("critiquing 'an autonaturalizing temporality that we might call straight time'); Annamarie Jagose, *Inconsequence: Lesbian Representation and the Logic of Sexual Sequence* (Ithaca, NY: Cornell University Press, 2002), ix ("As second is to first, so the cultural weighting of heterosexuality as first-order and homosexuality as second-order is secured through the self-licensing logic of sequence.").

55 As articulated by the Supreme Court:

> The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public

> availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.

Twentieth Century Music Corp. v. Aiken, 422 U. S. 151, 156 (1975). See also Sony Corp. of Am. v. Universal City Studios, Inc., 464 US 417, 430 (1984) ("[The Intellectual Property Clause] is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.").

56 See Jessica Silbey, "The Mythical Beginnings of Intellectual Property," *George Mason Law Review* 15 (2008): 319–380, 325 ("Origin myths authorize the initial social structure by appealing to authenticity…. through essentialism and being first-in-time.").

57 Butler, *Bodies That Matter*.

58 17 U.S.C. § 102.

59 See Pfaff v. Wells Elec., Inc., 525 U.S. 55 (1998).

60 See generally Burk, "Feminism and Dualism in Intellectual Property."

61 Laura A. Heymann, "How to Write a Life: Some Thoughts on Fixation and the Copyright/Privacy Divide," *William & Mary Law Review* 51 (2009): 825–872, 830 ("Fixation thus causes a kind of death in creativity even as it births new legal rights. Once an 'author' has fixed a certain version of her work, she has propertized its subject, subordinating the work to the various laws and tropes that come with a property-based regime. …"); Rebecca Tushnet, "Scary Monsters: Hybrids, Mashups, and Other Illegitimate Children," *Notre Dame Law Review* 86 (2011): 2133–2156, 2134 ("[A]nxieties about reproduction, who gets to control it, and whether appropriate reproduction can consist of cutting and pasting what's gone before are central … to current debates over fair use").

62 See, e.g., Sonia Katyal, "Performance, Property, and the Slashing of Gender in Fan Fiction," *American University Journal of Gender, Social Policy, and Law* 14 (2006): 461–518; Rebecca Tushnet, "My Fair Ladies: Sex, Gender, and Fair Use in Copyright," *American University Journal of Gender, Social Policy, and Law* 15 (2006): 273–304.

63 Heymann, "How to Write a Life."

64 Mattel Inc. v. Walking Mountain Prod., 353 F.3d 792 (9th Cir. 2003).

65 Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894 (9th Cir. 2002).

66 Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001).

67 Walt Disney Prod. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978).

68 Sonia K. Katyal, "Slash/ing Gender and Intellectual Property," in *Diversity in Intellectual Property: Identities, Interests, and Intersections*, ed. Irene Calboli and Srividhya Ragavan (Cambridge, U.K.: Cambridge University Press, 2015), 315–338; Anupam Chander and Madhavi Sunder, "Everyone's a Superhero: A Cultural Theory of Mary Sue Fan Fiction as Fair Use," *California Law Review* 95 (2007): 597–626; Rebecca Tushnet, "Economies of Desire: Fair Use and Marketplace Assumptions," *William & Mary Law Review* 51 (2009): 513–546.

69 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

70 Margaret Davies, "Queer Property, Queer Persons: Self-Ownership and Beyond," *Social & Legal Studies* 8 (1999): 327–352, 344 (emphasis added).

71 See, e.g., Katherine Franke, "The Domesticated Liberty of Lawrence v. Texas," *Columbia Law Review* 104 (2004): 1399–1426; Dean Spade, "Under the Cover of Gay Rights," *NYU Review of Law & Social Change* 37 (2013): 79–100.

72 Katherine Franke, "Dating the State: the Moral Hazards of Winning Gay Rights," *Columbia Human Rights Law Review* 44 (2012): 1–46.

73 See Peter Goodrich, Sonia K. Katyal, and Rebecca Tushnet, "Panel I: Critical Legal Studies in Intellectual Property and Information Law Scholarship," *Cardozo Arts & Entertainment Law Journal* 31 (2012): 601–623, 617 ("When First Amendment rights are expanded to allow upcoming and lesser-known artists to use parody, the doors open for well-financed artists like Richard Prince to come along and appropriate the work of less well-financed artists. The economic disparities become even more apparent where the expanding power of fair use winds up having distributive consequences that benefit some artists and leave others disadvantaged.").

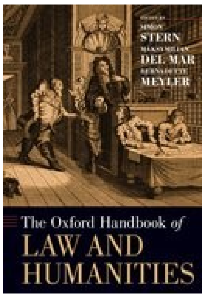
74 See Andrew Gilden and Tim Greene, "Fair Use for the Rich and Fabulous?," *University of Chicago Law Review Dialogue* 80 (2013): 88–104.

75 See Cohen, *Configuring the Networked Self*.

76 Cathy J. Cohen, "Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?," in *Black Queer Studies: A Critical Anthology*, ed. Patrick Johnson and Mae G. Henderson (Durham, NC: Duke University Press, 2005), 21–51, 47.

77 Gilden, "Raw Materials."

78 Martha T. McCluskey, "How Queer Theory Makes Neoliberalism Sexy," 115–134.



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CHAPTER

31 History, Literature, and Authority in International Law

Christopher N. Warren

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Abstract

One consequence of international law’s recent historical turn has been to sharpen methodological contrasts between intellectual history and international law. Scholars including Antony Anghie, Anne Orford, Rose Parfitt, and Martti Koskenniemi have taken on board historians’ interest in contingency and context but pointedly relaxed historians’ traditional stricture against presentist instrumentalism. This chapter argues that such a move disrupts a long-standing division of labor between history and international law and ultimately brings international legal method closer to literature and literary scholarship. The chapter therefore details several more or less endemic ways in which literature and literary studies confront challenges of presentism, anachronism, meaning, and time. Using examples from writers as diverse as Anghie, Spinoza, Geoffrey Hill, Emily St. John Mandel, China Miéville, John Hollander, Pascale Casanova, Matthew Nicholson, John Selden, Shakespeare, and Dante, it proposes a “trilateral” discussion among historians, international lawyers, and literary scholars that takes seriously the multipolar disciplinary field in which each of these disciplines makes and sustains relations with each of the others.

Keywords: presentism, anachronism, historicism, history of international law, Hugo Grotius, Anthony Anghie, reception studies, sources of international law, poetry, imperialism

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> The lawyer saith what men have determined; the historian what men have done.
>
> —Philip Sidney, *Apology for Poetry* (*c*. 1579)

WRITING “On the Interpretation of Scripture” in his *Tractatus Theologicus-Politicus* (1670), the heretical Amsterdam philosopher Benedict Spinoza controversially proposed an uninhibited inquiry into the making of the biblical canon: “Our historical study,” he wrote, “should set forth the circumstances relevant to all the extant books of the prophets, giving the life, character and pursuits of the author of every book, detailing who he was, on what occasion and at what time and for whom and in what language he wrote. Again, it should relate what happened to each book, how it was first received, into whose hands it fell, how many variant versions there were, by whose decision it was received into the canon, and, finally, how all the books, now universally regarded as sacred, were united into a single whole. All these details, I repeat, should be available from an historical study of Scripture."[1] The passage, which neatly illustrates Spinoza's larger project to bring Revelation's fanciful and often destabilizing truth claims under the jurisdiction of philosophical reason, is the epitaph to Pascale Casanova's magisterial *The World Republic of Letters* (1999; English, 2004) and underpins her own analysis, in which Casanova, like a contemporary Spinoza, sought to pierce the celebratory myths of equal p. 566 ↳ participation and literary genius by describing the true sociological procedures by which literary texts entered into the canon of world literature.

I start with Spinoza and Casanova to clear space for what I hope will be a trilateral methodological conversation among literary critics, historians, and scholars of international law. My primary concern follows from recent controversies over method among historians of international law that have exposed methodological divisions between intellectual historians, on the one hand, and legal scholars on the other. The chief matter of controversy concerns the role of anachronism, a charge leveled by a few historians at some international legal scholars but which other international legal scholars have embraced in the face of historians' evident displeasure. The controversies, in my view, offer a remarkable opportunity to examine deep-seated disciplinary suppositions within history, literature, and international law. As Johan Heilbron has written, the academy is organized "into structures of judgment and authority which are founded on a disciplinary division of labor. This division of labor is an institutional arrangement, inseparably consisting of cognitive and social structures, that is of fairly coherent sets of concepts, questions, references, and methods, and a corresponding social order of acknowledged specialists in departments, committees, and professional associations."[2] As we shall see, there are meaningful divisions of labor between history and international law, but part of my point here is also to insist that our understanding of those divisions of labor remains impoverished in some important respects because the cognitive and social structures of literature and literary studies have largely been absent from this conversation.[3]

To propose a "trilateral" discussion, then, is on the one hand an effort to bring together conversations that have long taken place separately under the terms "law and literature" or "law and history" and, on the other, an attempt to pick apart the overly broad organizing framework of "law and humanities." The recent debates occasioned by international law's "historiographical turn" help remind us that disciplines, like nations, have multiple relations.[4] And just as the relations I'm considering cannot be reduced to the names of "law and literature" or "law and history," neither is the name "law and the humanities" fully adequate to the task. While "law and literature" leaves out history and "law and history" excludes literature, "law and humanities" implicitly collapses literature and history into a single whole. Such tendencies mirror the ages in p. 567 ↳ which they've dominated: if the equipoised double structures of "law and literature" and "law and history" that first took hold in the academy in the 1960s and 1970s exhibited the balancing relationality of the Cold War, its broader successor "law and humanities" reproduced globalization's centralizing, unifying force. My intention here is to acknowledge meaningful disciplinary boundaries among law, history, and literature by considering the multipolar disciplinary field in which each of the disciplines makes and sustains relations with each of the others.

What follows comes in two main sections: "Anachronism in History and International Law" and "Literature and Anachronism." In Section 31.1, I summarize the debates over historicism in international law, using Spinoza and the problem of legitimate authority to crystallize their stakes. In Section 31.2, I turn to discuss several examples of literature and literary scholarship in this multipolar relational field that, as I've suggested, remains underserved by the appellations "law and literature," "law and history," or "law and humanities." One of my central contentions is that disputants over anachronism in international legal history can learn from literary texts and literary studies, which house an extensive and growing toolkit for transmitting meaning in and through time. The recent fissures that have emerged in international legal history between intellectual historians and historians of international law have a distinct counterpart in literary studies where a somewhat improbable coalition of traditionalists, Straussians, deconstructionists, postcolonialists, feminists, eco-critics, queer scholars, and others have joined together to question dominant historical methodologies.[5] "Restiveness with historicism," as Rita Felski puts it, "is beginning to make itself felt."[6] But I also engage with these debates as a way to speak back to literary scholars and to illustrate how reading and contributing to these disputes might enliven literary scholarship. Tensions in literary scholarship between formalism and historicism, presentism and anachronism, postcolonialism and world literature, global North and global South approaches, and so forth are hardly literary scholars' alone, and the ways we deal with such tensions can interact with parallel dynamics in adjacent fields—if we let them.

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31.1 Anachronism in History and International Law

To understand the "turf war" presently under way, one needs to know that the last two decades have seen a so-called historiographical turn in international law.[7] In one sense, this is a counterintuitive development since it is difficult to imagine international law *without* history. "All law seems to be about history at one level or another and perhaps has always been," Matthew Craven has observed.[8] "Yet it is equally evident," he writes—and this is the crux—"that the intellectual frame of rule-finding or policy-prescription also not infrequently involves an effacement of the historical character of the materials in question and the displacement of 'unnecessary' contextual factors of cause and explanation that might otherwise be of interest."[9] The turn to context has therefore been the most significant aspect of the historical turn. In 1999, historian of political thought Richard Tuck, for instance, published *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* and in 2004 the Finnish legal scholar Martti Koskenniemi called for an "intellectual history of international law" taking into account the "intellectual, social, and political environment[s]" of legal ideologies and especially "neighboring areas such as private law, international relations or political theory and philosophy."[10] Koskenniemi's suggestion, soon taken up with enthusiasm in the pages of the newly formed *Journal of the History of International Law*, was that legal scholars open their canons and methods to the salutary approach of historians of political thought like Tuck, J. G. A. Pocock, and Quentin Skinner, whose turn beginning in the late 1960s to speech-act theory and rhetorical contexts had proved capable of invigorating overly dry, deterministic, and ultimately anachronistic histories of ideas. As Skinner had written in a foundational essay, "classic texts are concerned with their own quite alien problems," not our own.[11] The scholarly task was to reconstruct historical context fully enough to understand these "alien problems" and show how authors and their texts intervened in their particular moments. Historian of international law Randall Lesaffer took this to mean "mak[ing] use p. 569 of the basic rules of historical methodology" and "approach[ing] the past ↳ with proper respect."[12] The "professional commitment to context and an avoidance of cause-driven history" involved developing a keen sensitivity to anachronism and subordinating presentist legal-political concerns.[13]

In a certain sense, the growing sensitivity to anachronism was less a wholesale innovation than a return to methods that Spinoza and other writers honed in early modernity. Scholars including Peter Burke, Thomas Greene, and Constantin Fasolt have argued that it was only during the Renaissance that Europeans even began to sense the possibility of anachronism.[14] Prior to that, history was too deeply attached to the project of moral instruction to engender a sense of historical process.[15] The then-dominant feeling that examples and analogies from the past could inform action in the present helped secure history from the countervailing notion of the past as a *locus* of difference.[16] Yet Renaissance humanists, in the process of searching out late interpolations into the text of the Roman *Digest*, began to invest juridical thinking with a new awareness of a differentiated past. In the short term, chronology aided the project of identifying spurious legal authorities. In the longer term, Renaissance historicism helped draw historicism's most basic distinction: the one between present and past. Spinoza's biblical criticism worked similarly. To medievalism's fourfold hermeneutic schema (literal, allegorical, moral, and anagogic), Spinoza added a radically destabilizing temporal dimension.[17] Early modern literature shows signs that this new forensic historicism was also opening up new opportunities for literary writers. Renaissance theater became adept, in Lorna Hutson's words, at "activating time-related topic questions such as 'when' or 'how long?' or 'how old?' " which "serve[d] as a way of both unifying the action and expanding [dramatic] representation into the past and the future."[18] Shakespeare's *Julius Caesar* (1599), for instance, includes an anachronistic mechanical clock, which in dramatizing puzzling continuities between ancient Rome and early modern p. 570 London ↳ also prompted theatergoers and readers to consider possible discontinuities.[19] Fundamentally, historicism became a broad-based method to scrutinize foundational sources of authority. Its forms of attention were most often meant to liberate the present from ill-grounded claims.[20]

Accordingly, international law's historical turn was not without its own politics. As intellectual historian Peter Gordon has observed, "historicizing [an] idea *into the past* [often] serves to defeat the idea and mark [] it as no longer legitimate."[21] Beginning in the 1980s, critical legal history had been vaunted as a method that usefully "produces disturbances in the field[,] … inverts or scrambles familiar narratives of stasis, recovery or progress[,] … advances rival perspectives[,] … posits alternative trajectories[, and] … unsettles the familiar strategies that we use to tame the past in order to normalize the present."[22] In short, "history is … a form of action."[23] What the international lawyers associated with international law's historical turn understood quite well was that the formal authority of international law depends on a certain kind of usable international historiography. While rarely stated directly, the "disenchanting mode of analysis" of international law's historical turn gave the project a critical Spinozist thrust.[24] Bringing purportedly "unnecessary contextual factors" into view could promote disenchantment and potentially even de-legitimation.[25]

The text of Article 38 of the 1920 Statute of the International Court of Justice (ICJ) shows why. According to Article 38, the legitimate sources of international law are: (a) "international conventions," meaning bilateral and multilateral treaties, (b) "International custom" (long-standing historical practice), (c) "The general principles of law recognized by civilized nations," and (d) "judicial decisions and the teachings of the most highly qualified publicists of the various nations."[26] Historical scholarship impinges at least indirectly on each of these, and perhaps most directly on "teachings … of the various nations" and what's p. 571 understood as "international custom."[27] But here, as ↳ Koskenniemi's earlier work had shown, the discrediting charge of *apologia* always hovers, which is why international law requires something perceived as a "pure" history, one as uncontaminated as possible by pique and prejudice.[28] According to Matthew Craven, "to make explicit the particularity of the context and explore the specificities of motive or cause—is to make it all the less relevant as a generalisable experience from which contemporary legal rules might be deduced."[29] In the preface to his 1618 book *The History of Tithes*, John Selden showed that he had intuited much the same. Declaring his work "meer narration," he renounced any rhetorical intent. *The History of Tithes*, he proclaimed, was "not written to prove *that Tithes are not due by the Law of God*; not written to prove *that the Laitie may detaine them*, not to prove *that Lay hands may still enjoy maintenance of the Clergie*. Neither is it any thing else but it self, that is, a meer Narration, and the *Historie of Tithes*."[30] Selden, himself a common lawyer who would go on to compose the famous *Mare Clausum* (1635), one of the key early texts concerning the law of the sea, understood as well as anyone the law's own needs. Law needs objective inquirers, faithful servants of positive facts. The norm-laden stuff of advocates, partisans, and ideologues, of embodied rhetorical actors with subjective passions and interests, cannot credibly be made international law.[31] A functionalist international law, that is, requires a non-functionalist history, "meer narration," a history that accepts that some legal questions endure through time.

One consequence of article 38's reference to the "teachings of the most highly qualified publicists of the various nations" as "means"—albeit "subsidiary"—"for the determinations of rules of law" is that "the sources of international law were (and, hence, to 'subsidiary' degree still are) identified with the treatises of the 'fathers of international law'—men such as Vitoria, Suarez, Gentili, Grotius, Vattel and Pufendorf."[32] International law's historical turn has therefore shown intense interest in such thinkers. As such, the disparate responses to two representative works of this turn can be instructive. In 2004, historian David Armitage published a deeply contextualized critical edition of Hugo Grotius's 1608 legal treatise *Mare Liberum*, placing a work often venerated as international law scripture by progressive international lawyers squarely within the challenging milieu of Dutch East Indies Company propaganda. And legal scholar Antony p. 572 Anghie published his 2004 monograph *Imperialism, Sovereignty and the Making of International* ↳ *Law*, arguing that sixteenth-century Salamanca jurist Francisco Vitoria, far from being the moderating brake on Spanish imperialism, in fact inaugurated a European tradition of exploitation under the banner of legal restraint.

While Armitage's edition found positive reception, Anghie's book irked some historians of ideas including Ian Hunter and Georg Cavallar, the former of whom found the book "dogged by debilitating anachronism and presentism."[33] According to Hunter, "It is this late nineteenth-century use of state sovereignty as an instrument of trans-territorial imperial hegemony that [Anghie's] critical historiography anachronistically projects backward onto early modern jus gentium [law of nations]."[34] In effect, Anghie was charged with violating what Constantin Fasolt terms historians' "most basic principle of method … thou shalt place everything in the context of its time."[35] "Show that a historian has unwittingly infected the interpretation of the past with some particle of the present, and you have shown the historian not only to have failed at the task, but to have failed shamefully."[36]

The criticism of Anghie's third world approach to international law (TWAIL) might have passed as so much run-of-the-mill "policing of anachronism" were it not for the subsequent observations of international legal scholar Anne Orford, who came to Anghie's defense, discerning in the criticism deep methodo-political tensions long elided in international law's historical turn.[37] As Orford writes, "Law and history stand on the opposite sides of the dividing line between present obligations and archaic traditions. The self-imposed task of today's contextualist historians is to think about concepts in their proper time and place—the task of international lawyers is to think about how concepts move across time and space."[38] The responses to Anghie were "contextualism as containment."[39] Anghie had studied Vitoria and his imperialist context not to posit a break between European colonialism and contemporary structures of international law but instead to show a troubling continuity. His intent, in his words, was "to illuminate the processes, the barely visible thoroughfares by which this colonial history insinuates itself into the discipline [of p. 573 international law] with enduring and far-reaching effect."[40] ↳ Rather than implicitly constructing a bad "then" and a better "now," Anghie's book rejected any such break in favor of the disquieting impression that the moral contagion of colonialism had not, in fact, been quarantined in the past.

As Orford pointed out, there was something very lawyerly about this approach, and not only because of its inbuilt logic of offense and remedy. It also presented the past for the purposes of the present. If legal argument involves mobilizing sources, cases, thinkers, and doctrines, Anghie's too was a legal past that could authorize—indeed require—action. Anghie may have reversed the moral valance by turning the standard encomia of the "forefathers" into critique, but his "judicialization" of Vitoria was truer to the essence of international legal scholarship than to the discipline of history.[41] "International legal method," Orford claimed, is "*necessarily* anachronistic."[42] Whether consciously or not, Anghie's critics were dissolving a source of political authority by applying the very same solvent that Spinoza had applied to Holy Scripture, that Casanova had applied to the literary world system, and that Armitage had applied to the so-called father of international law, Hugo Grotius.

31.2 Literature and Anachronism

Orford is surely right that Anghie brought an international legal sensibility to *Imperialism, Sovereignty, and the Making of International Law*—one of Anghie's first critical interlocutors used the distinctly juridical term "accomplice" to characterize Anghie's view of Vitoria—but we miss something critically important about the interplay of humanities methods and international law unless we recognize a slightly submerged but no less relevant literary sensibility as well.[43] International law's recent fascination with contexts has been oddly silent about *literary* contexts even though Ed Morgan has pointed out that "in interdisciplinary mode [international law] parallels, like a Nabokovian pale fire, the literary and aesthetic currents that surround it."[44] For much of the twentieth century, literature worked much like international law, and in part *because* of history. The traditional division of labor between international law and international history—in which history was a stable source of facts, customs, doctrines, treaties, and so forth and law the locus of norms and prescriptions—had, as a consequence, a second division of labor involving literature and literary scholarship. Hans-Georg Gadamer was among those most eloquent in observing that "literature does not exist as the dead remnant of an alienated being, left over from a later time as simultaneous with its experiential reality. p. 574 ↳ Literature is a function of being intellectually preserved and handed down, and therefore brings its hidden history into every age."[45] Literary texts, like international legal cases and doctrines have "busy afterli[ves]."[46] As such, they not only frustrate historicism's "stricture of recognizing the past in the present" but also potentially even frustrate the clear distinction between the two.[47] It was novelist William Faulkner who wrote in *Requiem for a Nun*, "The past is never dead. It's not even past."[48]

Such generalities are true enough for Anghie, but in Anghie's case it is possible to be even more precise. Anghie quotes novelist Joseph Conrad while citing the influence of postcolonial literary critics Edward Said, Homi Bhabha, and Gayatri Spivak among others. Postcolonial literary studies is deeply presentist "in principle if not in name," and it is noteworthy that Anghie's own intellectual formation includes an undergraduate specialization in postcolonial literature at Australia's Monash University.[49] While literary studies is of course a big and diverse tent, the postcolonialist scholars who influenced Anghie are themselves among the sharpest critics of historicist contextualism. A shared point of emphasis has been in noting the easy slippage between geographical difference and chronological difference that creates the powerful (if laughably illogical) category of "contemporary ancestors."[50] Kathleen Davis writes about the rise of historicism, for instance, that "There was no … 'superstitious, feudal Middle Ages' *before* colonialism, and doubtless there never would have been such without colonialism; vice versa, colonizers could not have mapped and administered foreign lands and bodies as they did without the simultaneous process of imagining such a 'Middle Ages.' "[51] Postcolonialists are all too aware that historicism has often been an instrument for self-congratulation on one side and domination on the other.

If Anghie's approach to the past joins a juridical approach to history with literary postcolonialism's skepticism of historicized difference, the argument he develops about formal sovereignty doctrine further suggests the influence of literary studies. Anghie shares with literary scholars the impulse to use form to draw continuities between past and present. In the sense that the formal sovereignty doctrine first developed by Vitoria in the sixteenth century in Anghie's view retains at the structural level the colonial impulse that modern international law habitually disclaims, Anghie's approach bears comparison with genre theorists in literary studies for whom literary genres like epic, tragedy, novel, and so forth are durable diachronic structures. Frederic Jameson, for instance, argues that literary "form, secreted like a shell or exoskeleton, continues to p. 575 ↳ emit its ideological message long after the extinction of its host."[52] The formal aspects of genre and doctrine, in other words, counteract the contextualist impulse to draw a sharp line between present and past, creating instead cross-pollinating methodological affinities between what Orford terms "international legal method" and literary studies.[53]

It is worth mentioning for any readers from other disciplines that historicism is no less troublesome in literary studies than it is in international law. Postcolonialists and presentists exist on one side of a spectrum that also includes new historicists and historical materialists, themselves vigorously attentive to "circumstances relevant to all the extant books … giving the life, character and pursuits of the author of every book, detailing who he was," and so on. In my own subfield of early modern literary studies, historicism over the last forty years has been closely associated with efforts to pierce myths of otherworldly genius—frequently Shakespeare's. The generation-long dominance of historicism has meant that anachronism continues to "serve as a cudgel with which to beat other scholars."[54] The claims that all literary texts are composed in a particular time and place and that those times and places are relevant to interpretation find relatively few detractors in today's literary studies, but the field tends to bifurcate there. The problem is, literary meaning is synchronic *and* diachronic, and both axes are available for study. Some scholars dig deeply into intellectual and material contexts while others attend to further meanings and pleasures unexhausted by synchronic contextualization. For the latter, models based on sound waves (Dimock), ghosts (Derrida), tradition (Jarvis), composting (Mentz), wormholes (Charnes), genetics (Moretti), palimpsests (Gil Harris), networks (Liu), and influence (Bloom) have been developed in Gadamer's footsteps.[55]

What thoughtful readers of literature know, in addition, is that literary writers have their own rich set of techniques for making meaning move through time. A non-exhaustive list of strategies might include genre, translation, verse, diction, and style. For dramatists, performance is recurrent renovation. Even the p. 576 briefest of allusions can knit past and present in striking ways. Consider the following examples from poets ↳ Geoffrey Hill and John Hollander and novelists Emily St. John Mandel and China Miéville. The very title of Geoffrey Hill's 1996 eight-poem poetic sequence *De Jure Belli ac Pacis*, for instance, evokes the impetus for, and reception history of, Hugo Grotius's 1625 *magnum opus* of the same name. Hill's is a characteristically complex poetic sequence, dedicated to the German jurist and diplomat Hans-Bernd von Haeften (1905–1944), a conspirator against Hitler whose subsequent execution by the Third Reich was preceded by von Haefton's declaration, "Legally speaking it is treason; actually it is not." In Hill's poems, twentieth-century European "history … is recurrently represented as 'poetry'—images and cadences of a lyrical power often akin to the working of music—although this 'poeticising' is not confined to the literary genre of verse but is ubiquitous in our representations of the past."[56] If, as in Hill's sequence, "our history and present time can seem a collage relieved of reasoning connection," the Grotian title suggests the role not of law but of poetry in offering "an over-arching order, a codification and means of resolution" with ambitions at once as grand, necessary, and futile as Grotius's *magnum opus*.[57]

In her 2014 novel *Station Eleven*, similarly, Canadian writer Emily St. John Mandel imagines a global flu pandemic whose few survivors turn to art and theater to repair the delicate fabric of civilization. While globalization's widespread international exchange helps transmit *Station Eleven*'s initial pandemic across distance, the novel distinguishes itself among the wider body of post-apocalyptic fiction using references to Shakespeare to create its own trans-temporal flows. Mandel's novel probes the distinctions (if any there be) between influence and influenza. While a main character, Miranda, for example, shares a name with the very character in Shakespeare's *The Tempest* who wonders about a "brave new world," the novel draws most deeply from *King Lear* and *Lear*'s profound meditation on the proposition that "Unaccommodated man is no more but such a poor, bare, forked animal." The actors and musicians of *Station Eleven*'s Traveling Symphony proceed on the basis of their own embodied intuitions about art's role in human flourishing: "Survival," they proclaim, "is insufficient." The key node in Mandel's pandemic is a Shakespearean actor named Arthur Leander, whose legacy generates the novel's three main plot lines, which follow Leander's three ex-wives *à la* Lear's three daughters. That Leander's surname contracts so easily to "Lear" emphasizes the point most clearly. Literary influence, which Mandel's novel might encourage us to call the Shakespearean flu, is ultimately a salvific contagion thankfully capable of leaping from past to present in

Station Eleven, and not through genre—novels and tragedies are after all very different—but instead by transmitting and mutating Lear's own binaries of nature and culture through intertextual allusion.

The contemporary writer perhaps most relevant to this essay's concerns is the Marxist novelist China p. 577 Miéville, who leads a second life as a well-known theorist of ↳ international law.[58] Miéville's richly imaginative novels bring into their worlds a long tradition of speculative and utopian fiction. The floating city of Miéville's *The Scar*, for example, is able invoke nearly 500 years of mercantilism, capitalism, and colonialism through its subtle reworkings of Thomas More's *Utopia* (1516). "Utopias are necessary," he writes in his own recent edition of *Utopia*, "but not only are they insufficient: they can, in some iterations, be part of the ideology of the system, the bad totality that organises us, warms the skies, and condemns millions to peonage on garbage scree."[59] Miéville's characters in his New Crobuzon trilogy include a group called the Remade, criminals whose Dante-esque punishments are written on their bodies through grotesque transformations intended, in Miéville's world, to aid penal labor.[60] Evoking Dante's own world to remind us of a period when "the 'brutal,' had not yet been veiled by the habits of civility and the pacification of modem life," the violence of such punishments both literalizes for readers the violence of a capitalist world system in need of ever more cheap labor for its reproduction and evokes *Inferno* to link that violence to older medieval forms.[61]

A poem that asks questions related to Miéville's Remade, albeit using techniques native to poetry and with a more playful, sartorial tone, is American poet John Hollander's "Tailor-Made"—a poem published, notably, in a New-York based journal in October 2001.[62] In the immediate wake of the September 11 attacks, Hollander's three ABBA quatrains ask, "How can a punishment fit a crime? / What's not ill-suited to a wrong?" before turning to an example from Dante's *Inferno* to suggest that "being light / In a heavy, dark and wrenching wind / Didn't drape" particularly well on Dante's famously lustful pair, Paolo and Francesca. Dante's tightly systematic *terza rima*, which goes hand in hand with his ostensibly systematic scheme of punishments, is here subjected to Hollander's scrutiny by way of Hollander's own highly self-conscious infelicities in meter and rhyme. "Fit" is precisely what rhymes like crime/overtime, wind/kind and frayed/underplayed *don't* do. Poetic regularity—*regula* is Latin for rule—is a Sisyphean task. As syntactic p. 578 units overflow their lines in "Tailor-Made," syllables ↳ range irregularly between seven and nine per line, literalizing in a slightly different way the poem's concluding rejoinder to Dante at the intersection of aesthetics and penal theory: "The overkill, the underplayed / Will always have an ugly look." Examples like Hill, St. Mandel, Miéville and Hollander remind us in some very different ways of the many resources literature has at its disposal to help writers stitch time together.

That each of these more diachronic approaches continues to draw in one way or another on temporality can remind us that literary and legal studies' shared interest in what persists through time doesn't mean that literary and international legal methods necessarily must reject the critical Spinozist impulse. As Martti Koskenniemi has acknowledged, part of the appeal of international law's historical turn was the chance to craft "better narratives."[63] Anghie's work in particular shows how Spinozist contextualism might be avoided on one level but powerfully applied on a different plane of analysis. For this reason, I find Orford entirely convincing in noticing a difference in international lawyers' temporalities but not quite right to tie international legal method and anachronism so completely. Chronology remains as fundamental to Anghie's analysis as it is to Pascale Casanova's *The World Republic of Letters*, for example, and not simply as an organizing principle. What chronology enables for both Anghie and Casanova is detailed attention to moments of entrance, of recognition, of what theater scholars might prefer to call "entering the world stage." In Anghie's legal framework, recognition concerns sovereignty—international legal personhood. In Casanova's literary sense, it means enjoying global literary prestige. But the Spinozist template renders both the international legal system and the world literary system as *made* objects akin to the canonical Bible or a stage play and as such characterized by time-stamped inclusions and exclusions and available for chronological scrutiny.

Chronology in these analyses is both a method and subject of inquiry. Global literary prestige and international legal personality are both governed by what Casanova terms a “logic of temporal competition” in which lateness is a “handicap.”[64] If scripture could seem to Spinoza’s contemporaries a unified whole, each book as equal in its claim to divine revelation as the next, it was largely because it had been exempted from historicist inquiry. Reason required attending to the hows and whys in the making of this privileged, putatively unified whole. For Anghie and Casanova, the Spinozist concern is less the biographical author’s rhetorical intent than the historical moment of entrance—sometimes understood in literary studies as “reception.”[65]

And in fact, international legal personhood and literary prestige are co-constitutive. Anghie writes, “The transformation of colonial territories into sovereign states is central to the claim that international law is now truly universal because all societies whether p. 579 ↳ European or non-European, participate as equal and sovereign states in the international system.”[66] But this claim to equality and universal participation can never be as convincing as it would like to be due to the inescapable timeline over which the international system developed. As Casanova puts it, “the temporal law of the world of letters may be stated thus: *it is necessary to be old in order to have any chance of being modern or of decreeing what is modern*. In other words, having a long national past is the condition of being able to claim a literary existence that is fully recognized in the present.”[67] For Anghie, colonial international law’s long delay in recognizing non-Western sovereignty, accomplished through methods such as a supposed “standard of civilization,” the notion of quasi-sovereignty, and European mandates, similarly perpetuates unequal outcomes within contemporary international system’s putative society of equals. Third world and postcolonial nations “late” to sovereignty do not enjoy its true privileges nor, late to what Casanova terms “Greenwich literary mean time,” do they enjoy literary prestige.[68] After all, Shakespeare’s Shylock converts to Christianity at the end of *Merchant of Venice*, but it matters considerably when (and why) he does so.

The point here is that far from rejecting Spinozist historicism, many of the literary and international legal methods under discussion are in fact quite capable of adapting them to slightly different objects. Their project of demythologizing the international system relies fundamentally on a Spinozist interest in the circumstances of reception—moments of admission, membership criteria, and the procedures and circumstances of canon making.

To understand the international system as made in such ways shows—and in part facilitates—an openness to the language of poetry, for, as Philip Sidney emphasized in his great *Apology for Poetry*, the term poet “cometh of this word *poiein*, which is ‘to make.’ ”[69] Victoria Kahn among others has encouraged us to understand “poiesis not simply as a literary question but also as an explicitly political question.”[70] This is why it is striking to read recent scholars of international law like Ralph Michaels and Matthew Nicholson proposing “more creativity, more imagination … more willingness to depict alternative worlds.”[71] Be more like poets, international lawyers are telling their colleagues. In order to “see international law anew,” Nicholson urges international legal scholars “to acquire the poet’s anxiety and write texts that re-imageine [sic] legal practice as p. 580 ↳ something unlimited by ‘past texts.’ ”[72] Nicholson’s allusion to the poet’s anxiety refers to the so-called anxiety of influence that critic Harold Bloom has long insisted leads literary writers to distinguish themselves from their precursors. In Nicholson’s view, legal scholars should treat past texts and practitioners not as models to follow but as raw materials for a quasi-literary “process of constellating fragments to form a representation of reality.”[73] The inspiration for this latter formulation is Walter Benjamin’s “allegorical-representational practice” rather than Philip Sidney’s Elizabethan poetics, but the rationale is not far from Sidney’s own imagistic poetics, in which the poem is conceived in part as a “perfect picture”: “The lawyer saith what men have determined; the historian what men have done,” but “only the poet, disdaining to be tied to any such subjection, lifted up with the vigour of his own invention, doth grow in effect another nature, in making things either better than nature bringeth forth, or quite anew.”[74] In recent proposals by Michaels and Nicholson, international lawyers are invited to cast aside the discipline's traditional and often feigned humility and embrace their own agency in world-making.

31.3 Conclusion: Divisions of Labor

As we have seen, literature and literary studies confront challenges of presentism, anachronism, meaning, and time in various ways. The reasons such techniques might be of interest to international law at the moment is that scholars including Anghie, Orford, Parfitt, and Koskenniemi have evidently taken on board historians' interest in contingency and context, but "Restiveness with historicism is beginning to make itself felt."[75] The examples from Antony Anghie, Geoffrey Hill, Emily St. John Mandel, China Miéville, John Hollander, Pascale Casanova, Ralph Michaels, and Matthew Nicholson offered opportunities to consider some of the distinct affordances of postcolonialist temporalities, formal analysis, allusion, character names, plot, fictional geographies, meter, rhyme, enjambment, and *poiesis*. Historians and legal scholars associated with international law's historical turn largely succeeded in "bring[ing] legal principles down from the conceptual heaven and into a real world where agents make claims and counterclaims, advancing some agendas, opposing others."[76] But a consequence of international law's historical turn has been to sharpen methodological contrasts between intellectual history and international law. In line with the Spinozist tradition, it has also raised problematic questions about the authority of international law.

One thing missing in this analysis might be called the aesthetic force of contextualism. Contextualism in most accounts is divorced from aesthetic experience, but this need not be the case. In positing a break between past and present, historicism opens p. 581 ↳ a space for a kind of scholarly sublime. Meaning that somehow travels over the distance between present and past takes on an air of the mysterious—a defiant, spectral, otherworldly kind of meaning that gathers a unique, transgressive charge precisely because the meaning of the past is ordinarily thought to stop where the present begins. This force should not be neglected in considering contextualism's long and perhaps enduring appeal.

It is appropriate to conclude by considering whether recent debates auger changing divisions of labor among history, literature, and international law. Functionalist international law's need for a "pure" past has more or less required that it devalue historical scholarship departing from a quasi-antiquarian norm. Since history that fails to obscure its presentist politics or rhetorical subjectivity cannot pass through the gates erected in ICJ article 38, a second division of labor has long pertained between history and literature, and by extension historians and literary scholars. In effect, literary studies embraced what history disavowed. If contextualist history "evades the burden of critical engagement by retreating into the apparently disengaged stance of contextualist reconstruction," literary studies has felt freer to embrace "the fundamentally radical act of putting one's cards on the table."[77] A history that confined itself to impartial description—what Philip Sidney called the "bare was" and Selden called "meer narration"—meant that literature and literary scholarship could embrace more flexible temporalities and to wear their subjectivity, morality, and political commitments on their sleeves. In other words, law's long-standing contract with historicism—contextualism as containment—created conditions that permitted literature and literary scholarship to exhibit features that, in certain respects, share more with law than with history.

But now that explicitly political international legal scholars trouble this division of labor by doing a committed, quasi-literary legal history—now, that is, that "it is no longer believable to claim that a theory of international law (or much else) could depend on an ultimately non-partisan way of knowing"—what challenges and opportunities arise?[78] For one thing, an international legal field that looks more like literature and literary studies could be able to enjoy the pleasures of explicitness, inventiveness, and creativity. A field less anxious about the boundary between international law and international politics could also be able to draw from a powerful set of resources more or less endemic to literature for creating "cross-temporal community" and for moving meaning through time.[79] And it may also be able to borrow some of the moral authority that literature and literary studies often generate by openly displaying (or neglecting to cloak) their commitments. Poets, as Philip Sidney wrote, have no inherent obligations to past lives or to particular doctrines or precedents. Literary authority arises in part from this freedom. As former US President Barack Obama told an audience at Carnegie Mellon University recently, "I was an English and Political Science major ... I have ↳ probably learned more from reading novels than reading textbooks." Literature and literary scholarship can boast a long tradition in changing hearts and minds, and "makers" can teach and delight in part because they have "no law but wit."[80]

But a note of caution is in order too. While literature and literary studies have exerted great influence, they have done the vast majority of their teaching outside the institutional frameworks of international law. ICJ article 38 remains a powerful "tool for separating law from non-law," and poets, novelists, and literary scholars have little reasonable expectation to be admitted through its gate.[81] This is not exclusively due to lack of disciplinary training either, for historians' scholarship is cited regularly. Rather, literature and literary scholarship have largely done different jobs in the disciplinary division of labor in part because practitioners have been unwilling to pay the requisite stylistic and substantive costs. Ultimately, if international juridical method veers too close to literature and literary studies, it will find itself balancing similar risks.

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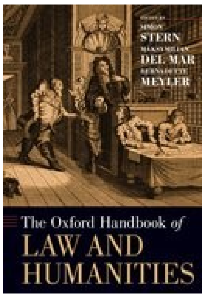

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CHAPTER

32 Uncovering Credibility

Julia Simon-Kerr

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Abstract

The project of evidence law is in many ways analogous to that of the author or artist. All seek to expose deeper truths. While the novelist can freely invent character and corresponding behavior, evidence law uses fictive devices to recreate a coherent narrative from ostensibly unimagined facts. It does this, in part, by structuring the ways in which we assess witness credibility. What witnesses say is at the heart of most trials and whether to believe those witnesses is an overarching concern. The novelist or painter can show us the inner life of characters through an omniscient narrator or a telltale blush. Evidence law employs a different, though no less evocative, means for signaling credibility. It makes otherwise irrelevant information admissible at trial as credibility evidence, encouraging fact-finders to consider the kind of person whose word they are being asked to accept by digging into that person's past. In admitting this evidence, the law relies on a false equivalence between a propensity to lie, which will allegedly be uncovered through credibility evidence, and evidence tailored to the question of whether a witness *should* be believed, which is what is actually being offered to the fact-finder. This chapter seeks to disentangle the two concepts—propensity to lie and worthiness of belief—and in so doing to reveal the danger in mistaking a fundamentally authorial impulse to use worthiness and status-based distinctions to color in the narratives of the courtroom in service of a hyper-rational process of proof.

Keywords: credibility, evidence, proof, narrative, race, gender, status, stereotype, propensity

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> *"Do you mean," she said sharply, "that I'm to believe that man and all the things he said?"*
>
> *"No," said Hume. "I shouldn't believe that man; not even if you believe all the things he said."*
>
> *"What do you mean?" she demanded.*
>
> *"Frankly, I think he is a thoroughly bad egg," said the tutor.*[1]

CREDIBILITY in the law reflects our human inclination to assess trustworthiness using cues about social conformity. As Chesterton's tutor implies in the quote above, deciding that someone is a "bad egg" may often be as salient to whether we believe them as the truth of their actual words. Philosophers have long recognized this feature of credibility judgments. Hobbes, for example, said belief involves two assessments, one of "the saying of the man," and next, "his vertue."[2] The former is an evaluation of what the person has said while the latter addresses the type of person the speaker is thought to be. The literary canon is rich with works exploring the implications of our insistence that a "bad egg" is not to be believed no matter how truthful. The best of these grapple with how we identify—or more often misidentify—the "bad egg." That definitional question also bedevils evidence law.

Evidentiary codes throughout history have focused both on identifying lies told in the moment, often by pointing out inconsistencies or biases of the witness, and on identifying the "bad eggs," or people who are p. 584 thought unworthy of being believed because of ↳ who they are.[3] For example, Jewish law has barred certain people from being witnesses, including those who play at dice, commit usury, or, more curiously, raise pigeons.[4] Athenian courts considered adherence to extralegal social norms so critical a factor when adjudicating unrelated legal claims that Athenians often chose to comply with the norms rather than face an adverse judgment.[5] In modern European courts, staffed with investigating judges, a full dossier on a witness's past is considered relevant to his or her reliability.

American evidentiary rules similarly create avenues through which a witness's credibility may be impeached with evidence about personal attributes unrelated to the case at hand, such as a prior criminal conviction or a reputation for untruthfulness.[6] In this way, the law focuses a fact-finder's attention not only on whether the witness is lying in the moment but also on credibility itself, a concept that does not simply track truthfulness. Indeed, as it has for over a century, *Black's Law Dictionary* still defines credibility as "worthiness of belief."[7]

By permitting impeachment with personal attributes unrelated to a given case, US law reflects a social reality in which credibility is still a powerful cultural concept. While it would be hard to claim, as did one nineteenth-century evidence treatise, that "a lost good name is ne'er retrieved,"[8] as humans we inevitably draw upon generalizations about other people when deciding whether to credit their statements. Yet, unlike other legal systems, which embrace unabashedly their definitions of the "bad egg," this reality in the United States is overlaid with a fiction. In US courts, evidence that goes to whether a witness is *worthy* of belief is treated instead as a measure of the probability that a witness is or will be untruthful.

That evidence rules involve fictive elements is hardly a surprise. The project of evidence law is in many ways analogous to that of the author or artist who seeks to expose deeper truths. While the novelist can freely invent character and corresponding behavior, evidence law uses fictive devices to recreate a coherent p. 585 narrative from ostensibly ↳ authentic facts. It does this by regulating the words of witnesses and, in turn, the way in which we assess witness credibility. If what witnesses *may* say is the primary focus of evidence law, leading to prohibitions on hearsay and constraints on the form of questioning, then *whether to believe* those witnesses is an overarching concern. The novelist can give us access to the inner life of characters so that we know—or think we know—which of them we believe. The painter can add a telltale blush or a heavenly glow to indicate integrity or its absence. Evidence law employs a different, though no less evocative, means for signaling credibility. It adds otherwise irrelevant details to the trial narrative, encouraging fact-finders to consider the kind of person whose word they are being asked to accept. These external proxies for truthfulness make up a person's credibility in the eyes of the law.

Yet unlike the novelist or painter, the law has a commitment to using "a logical progression of inferences with evidential hypotheses" to decide if facts required by the operative law have been "established to the requisite degree of probability."[9] This notion that evidence is an accumulation of hypotheses and their attendant probabilities, which has some echoes of the Aristotelian hierarchy that privileged the most artificial proofs,[10] ignores the fictive nature of evidence. In particular, it cannot offer a persuasive explanation for rules that focus our attention on a witness's worthiness of belief. The explanation courts have offered is not satisfactory because it relies on a false equivalence between a propensity to lie and evidence tailored to the question of whether a witness *should* be believed. This chapter seeks to disentangle the two concepts—propensity to lie and worthiness of belief—and in so doing to reveal the danger in mistaking a fundamentally authorial impulse to use worthiness and status-based distinctions to color in the narratives of the courtroom for a hyper-rational process of proof. Section 32.1 situates credibility as a culturally resonant concept that is distinct from truthfulness. Section 32.2 gives a historical account of US impeachment law in order to tease out the problems that arise when social conformity or status is treated as a marker of truth-telling. This history begins to reveal the gendered and racial contours of the legal approach to credibility, which I trace in greater detail in Section 32.3. In the conclusion, Section 32.4, I reflect upon the ways in which our human drive for narrative coherence may make the search for "bad eggs" an abiding feature of credibility doctrine.

32.1 Credibility and Truth

In a mid-twentieth-century opinion, the New Hampshire Supreme Court offered a surprisingly candid defense of its use of credibility as a tool to aid in the search for truth. The court explained that deciding whom to believe is not simply a function of listening ↳ to the words spoken. In order to "discover the truth," the court reasoned, something more must be known about the witnesses whose words serve to construct the narrative of the trial. "What a person is," the court wrote, "often determines whether he should be believed. When a defendant voluntarily testifies in a criminal case, he asks the jury to accept his word. No sufficient reason appears why the jury should not be informed what sort of person is asking them to take his word. In transactions of everyday life this is probably the first thing that they would wish to know."[11]

This is, in essence, a call for narrative coherence in the trial. Without certain information about a witness, and particularly a defendant, the jury cannot reconstruct the narrative about the witness that is a vital part of deciding whether to believe her. Thus understood, it is difficult to argue with the New Hampshire Supreme Court's claim that we need to know "what sort of person" is asking us to believe her. It is axiomatic that humans rely on credibility judgments in making decisions about whom to believe. Credibility in this sense describes the very "capacity to be believed,"[12] reflecting an amalgamation of those qualities that help one person trust another. As such, credibility identifies features that facilitate our ability to judge whether to believe things we are told by others. These are the additional facts we need to fill in the narrative about the person in front of us, or put another way, to facilitate our judgments about them.

Yet credibility and truthfulness are not synonymous. Among friends, the two are closely connected: long experience may teach us which friends are generally truthful and therefore trustworthy. But with mere acquaintances, public figures, or strangers, we necessarily rely on cues that may have little to do with truthfulness because these are the only ones we have. In this way, credibility identifies features that help us decide whether to believe other people when we have limited information. While the result of having credibility is that one is believed, having credibility is not necessarily a function of truth-telling. One can be lying and still have credibility just as one can lack credibility and be truthful. Instead, credibility attaches to those who comport themselves *as though* they are truthful. It is like the telltale blush,[13] as evocative as it is potentially deceptive. To appear truthful requires the speaker to conform to social norms of what a trustworthy person is like. In other words, as the classic legal definition of the term reveals, credibility is tautological, crediting those who are "worthy of belief."

So how do we decide who is worthy of belief? In the absence of information, as philosopher Miranda Fricker explains, credibility judgments, like many other facets of human thought, involve the use of heuristics. Fricker refers to these as “stereotypes,” which she defines neutrally as “widely held associations between a given social group and one or more attributes.”[14] If we re-label these stereotypes as pre-existing narratives, p. 587 ↳ it is perhaps easier to accept Fricker’s contention that it is socially productive to make these generalizations by deciding how well a person fits into a previously observed or learned narrative. Some such pre-existing narratives are reliable and provide useful shortcuts that help us make good interpersonal judgments efficiently. Without the ability to generalize based on group membership or other attributes, it would be much more costly to exist in communities.

More to the point, it may even be impossible for humans to think without using some form of shortcut to enable inferences and predictions in conditions of uncertainty.[15] Our brains look for the hallmarks of familiar narratives because they allow us to fill in information about people and predict their behavior more quickly than we would otherwise be able to do. When credibility matters, we will inevitably use such heuristics to categorize and evaluate the truth of what we are told, particularly by those about whom we have little personal knowledge. As long as the narrative is reliable, it is beneficial for us to rely on it.[16] If a person who fits the pre-existing narrative of the “bad egg” is truly bad, it makes sense that he would be unpersuasive. As Fricker puts it, we “oil the wheels of testimonial exchange” when we engage in this type of “social categorization of speakers.”[17]

Thus understood, credibility comprises generalizations we make from often limited information to help us decide whom to believe. It tells us “what sort of person is asking us to take their word.” Indeed, because we think about many things using social categorization and heuristics, it would be surprising if our credibility assessments of relatively unknown people were any different. What bears emphasis, however, is that these credibility judgments, most particularly the ones we make of strangers, are constructed from observations that have little to do with truthfulness. Instead, they are informed much more by social notions about what types of people are reliable in particular situations and how reliable people should look and act.

32.2 Credibility Narratives and Evidence Law

I have just argued that credibility and truthfulness are distinct. As humans and storytellers, we are drawn to social markers about a person which we compare with pre-existing narratives that, in turn, structure our assessments of their believability. These narratives may be innocuous and even efficient ways to help us assess the words of strangers in daily life, but they carry the danger that the words of those who belong to p. 588 disfavored groups or whose behavior fails to comply with social expectations will be wrongly ↳ discredited.[18] To help illuminate this point, and as an entrée into a brief history of credibility in US law, I turn to George Elliot’s *The Mill on the Floss*. The late nineteenth-century novel is contemporaneous with early credibility jurisprudence in the United States—whose emphasis on the worthiness of speakers is still a central feature of the law today. In the novel, Elliot explores the potential for socially ordained credibility narratives to lead away from, not closer to, the truth.

We learn early in the novel that the heroine, Maggie Tulliver, does not look the part of a credible woman. Maggie is a dreamer with dark skin and unruly hair. She is so often called a gypsy that at one point she runs away to join them, symbolically aligning herself with people her brother scornfully labels “thieves.”[19] Her wild appearance is echoed by Maggie’s equally nonconforming longing for enlightenment and like-minded companionship. Early in the novel she is caught reading Defoe’s *The History of the Devil*, which is apparently “not quite the right book for a little girl.”[20] A “prettier book” would have been more socially acceptable. These characteristics are aligned with an almost painful inability to dissemble to cover up her nonconformity. Unlike her deceptive Victorian brethren, such as Midwinter in Wilkie Collins’s *Armadale*, Maggie cannot harness untruth as a productive force. Rather, Elliot establishes her as a moral exemplar, not least for her fundamental honesty both to herself and to others.

Maggie's brother, Tom, is in many ways her opposite. Uncompromising and lacking in imagination, he represents a society that offers rigid behavioral prescriptions for women, demanding absolute adherence to these norms of conduct and ignoring sparkling internal qualities wholly in favor of their external performance. As the Victorianist John Kucich explains, in such a society "subjective standards of truth and falsity necessarily come into conflict with social norms of truth and falsity."[21] Bearing out this observation, toward the end of the novel, Maggie's closest confidants attest their "belief in [her] truthfulness" and her innate goodness. Yet she is labeled "deceit[ful]" by her brother, who tells her, "I can't trust you, Maggie. There is no consistency in you."[22] What Tom means is not that Maggie is not truthful but that she lacks the qualities he associates with credibility. As Elliot explains, part of Tom's problem is that credibility can be misleading because truth itself requires flexibility and openness to surprise. "To minds strongly marked by the positive and negative qualities that create severity," she writes, "prejudices come as the natural food of tendencies which can get no sustenance out of the complex, fragmentary, doubt-provoking knowledge which we call truth."[23]

p. 589 The story of Maggie Tulliver is in one sense a cautionary tale about how credibility comes to measure qualities such as social conformity or the extent to which a person is a member of a historically discredited group. And it is here that we can clearly see the danger in the pre-existing narratives that make up our credibility judgments. The hardening of an innocent generalization into a prejudice, defined by Fricker as a belief which resists counter-evidence "owing to some affective investment on the part of the subject,"[24] is antithetical to being receptive to truth. Rather than help us identify liars, prejudice inhibits critical thought and prevents hearers from making good judgments about the truthfulness of the speaker.[25] Although we learn that Maggie Tulliver is truly good, and, by extension, truly honest, Tom is blind to that truth, focused only on his small-minded need for Maggie to conform.

The tragedy of *Mill on the Floss* is an apt starting place for a brief history of credibility as a feature of American evidentiary law. Much of the earliest credibility jurisprudence in the United States focused on keeping the nonconforming, either through status or action, from the witness box entirely. Rather than hear from these people, the law was willing to forego the narratives of certain classes of witness. Common law and later statutory incompetency rules held that people with an infamous character lacked credibility and therefore should not be sworn as witnesses in court. Infamy was associated with certain types of crimes or punishments, generally those that would produce dishonor or a "loss of character or position."[26]

Incompetency doctrine also focused on status. In many states, race was used as a blanket testimonial bar.[27] The federal government also resorted to status-based credibility distinctions. The Geary Act of 1892, for example, required that Chinese laborers be deported unless "at least one credible white witness" could vouch for their presence in the country at the time of passage of the act.[28] Thus, for early courts, credibility was so tied to status and good character that those who did not possess the requisite status or character were deprived of a voice in legal proceedings.

When incompetency rules fell out of favor in US law toward the end of the nineteenth century, legislatures and courts grappled with how to reshape impeachment jurisprudence. Moral turpitude was one standard that emerged to delineate those crimes and acts that courts would consider relevant and therefore admissible on the question of credibility. The moral turpitude standard grew out of the law of slander, where it had been used to identify accusations implying honor code breaches serious enough to ruin a reputation.[29] Courts looking for ways to identify behavior relevant to witness credibility turned to moral turpitude as opposed to evidence that might have been seen as having a more direct connection to a propensity for
p. 590 untruthfulness, such as past lies. ↳ As in *Mill on the Floss*, worthiness of belief was thus tied to behavior consistent with honor or a good reputation and a witness could be discredited with evidence of conduct

thought to signify moral turpitude. In the words of one state's highest court, "violation and disregard … of the rules of decent society" would render a witness unworthy of belief.[30] Or, as explained by another state supreme court, a man's "word and his oath" are judged by his "character," such that a jury should hear of a witness's turpitude.[31]

Even as they imported a moral turpitude analysis into impeachment jurisprudence, US courts grappled with the implications of tying credibility to "the rules of decent society." As becomes so clear in *Mill on the Floss*, for women in the early nineteenth century, these rules were largely focused on sexual morality. They required that women not only remain chaste prior to marriage and faithful during marriage but also that they maintain their reputations for chastity. The cases from this time reflected a deeply engrained cultural tradition, unabashedly articulated by many of the writers classically educated judges were likely to have read. Rousseau, for example, wrote in *Émile*, his guide to raising young men, that "no women who permits herself to be considered vile is really virtuous."[32] Making the same point more pithily, Caesar famously wanted his wife to be "not only free from sin but from suspicion."[33] Responding to this emphasis on maintaining a pristine reputation, Mary Wollstonecraft offered a critique of women's credibility itself. By "encrusting morality" this single-minded focus on the appearance of virtue for women "eat[s] away the substance" and corrupts women's ability to be actually good.[34] Women are forced to focus more on how their words or actions will look to others than on any other guiding principles. Twentieth-century feminist thinkers, such as Adrienne Rich, identified a connection between behavioral expectations focused on sexual purity and a discounting of the words of women.[35] Rich wrote that "honesty in women has not been considered important," a point that underscores the difference between credibility, which is a function of generalizations from compliance with social norms, and honesty itself.

As the legal rules surrounding credibility developed, attorneys not surprisingly sought to impeach female witnesses with evidence of their sexual immodesty.[36] Courts had varying responses to such impeachment attempts, but for a time many accepted the general proposition that chastity and credibility were intertwined. In Missouri, for example, a rule developed that a woman's credibility could be impeached with evidence of her unchastity whereas for a male witness such evidence was considered irrelevant. The p. 591 Missouri Supreme Court explained that "[w]hat destroys the standing of [women] ↳ in all the walks of life has no effect whatever on the standing for truth of [men]."[37] Other courts suggested that character witnesses should simply be asked whether they would believe a female witness on oath. For these courts, reputation was a useful shorthand for getting at credibility because, for example, it would be hard to find a character witness "knowing [the witness's] general reputation to be that of a public prostitute, who would … maintain for her the credibility of an ordinary witness."[38]

By the time the US Congress enacted the federal rules of evidence in 1975, these doctrines explicitly linking chastity to credibility had been abandoned. Yet, the link between credibility and ideas of social worth was very much alive. For example, there was some consensus in the common law that past criminal convictions and a reputation for being untruthful are almost always relevant to credibility. Although a proposed rule suggested that only prior convictions for perjury or forgery or other crimes involving false statements should be admissible to impeach witnesses, Congress ultimately decided that *any* criminal conviction subject to a punishment of more than a year would be presumptively relevant to credibility. While other common-law countries, most notably England, moved away from impeaching criminal defendants with prior crimes,[39] evidentiary codes in the United States continue to single out prior felony convictions, as well as testimony about a person's truthfulness or lack thereof, as admissible because of their relevance to credibility. Some states like Texas and California even continue to focus explicitly on "moral turpitude," while others, like Minnesota, employ a forthright "whole person" doctrine that makes explicit the idea that "what a person is" will tell us something about his or her credibility.[40]

Through these rules of evidence, the U.S. legal system continues to credit the narrative that a witness's prior misconduct should inform any conclusion about whether that person is worthy of belief. This is not to say that the rules never focus on prior lying as an indicator of future lying. Almost all jurisdictions treat past convictions for perjury, forgery, and embezzlement as automatically admissible to impeach credibility. But the rules in almost every state and the federal system expose witnesses, including criminal defendants, to admission of a broad range of prior convictions with no discernable bearing on truthfulness.

The absence or presence of a criminal record thus forms a core element of credibility in the American legal system. If a witness has a criminal conviction and the trial judge finds the information will not prejudice the jury, the fact-finder is invited to find that the witness is not worthy of being believed because of that conviction. The question that these impeachment rules frame is thus not whether the witness is likely to be lying but rather whether because a witness is a "felon," he or she *should* be credited. Indeed, in its insistence that prior convictions can serve as a proxy for the credibility of criminal defendants, the United States has become an outlier.

p. 592 It is not surprising that we have created a category of admissible evidence focused on social markers of credibility as distinct from truthfulness. The law allows its fact-finders to make credibility judgments in much the same way they are made in everyday life. Indeed, generalizing from past criminal conduct to dishonesty, despite a sworn promise to tell the truth, is arguably an effective way to signal to the fact-finder that the witness is a "bad egg" and a potential liar. Yet, however effective these rules may be, they carry serious implications and ones that may go unremarked unless we understand that credibility is a specialized construct with no direct bearing upon the propensity for truthfulness. Further, the ways in which the law gives content to credibility has implications along lines of gender, race, and class in the United States. The next section addresses these implications.

32.3 Credibility Distortions

In 1911, twelve-year-old Lillian Apley ran to a neighbor's house and pleaded for refuge.[41] She claimed that her father, Emmet Apley, had beaten and raped her repeatedly. Lillian's short life had been a difficult one. Her mother had died when she was very young and she had been placed in an orphanage and taken to Oregon with a foster family. The family turned her out. She was eventually picked up by the Salvation Army and taken to Portland where she ended up in a juvenile detention home. Emmet had not seen her in ten years when he went to Oregon to bring her back to North Dakota where he was living with his wife and four children from his second marriage. Soon after Lillian arrived, her stepmother and stepsiblings went on a week-long visit to her parents. It was then that Lillian arrived at the neighbors and made her allegations against her father.

Emmet was tried by a jury and convicted of statutory rape. As in many cases of sexual assault, the trial turned on whose word was more believable, Lillian's or Emmet's. A physical examination was consistent with Lillian's account of having had intercourse during the relevant time. The neighbor testified that Lillian had come to her with the account of her beating and rape. Lillian herself testified about the assaults. For his part, Emmet denied her account but acknowledged that he beat her for disobedience. His lawyer attempted to cross-examine Lillian to suggest that she had worked as a prostitute and lived in a brothel in Washington State, which she denied. The trial judge excluded the evidence, finding it irrelevant because Lillian was under the age of consent. When Emmet appealed his conviction to the North Dakota Supreme Court, this proved a crucial mistake.

The Supreme Court held that it was reversible error to exclude evidence about Lillian's general reputation for sexual impropriety. Although her consent was not at issue in the statutory rape case, the court mustered an impressive array of precedent in support of its holding that the evidence was relevant to her credibility.
p. 593 Here, the court drew a ↳ distinction between the truthfulness of specific testimony and the general credibility of a witness. It held that evidence tending to "degrade, disgrace, or criminate" a witness was

relevant to the latter.[42] In Lillian's case, according to the court, the "testimony bearing upon immoral habits and general immorality and therefore affecting [her] credibility" would have been crucial to Emmet's defense.[43] Because of this, the court reversed Emmet's conviction.

Like Maggie Tulliver, Lillian Apley was viewed as unworthy of belief because of her perceived immorality, the fact that she had possibly been "disgraced." Both women may have been truthful, but their perceived lack of virtue meant that they would not be given credit in either a court of public opinion or of law. There are several obvious problems with this gendered approach to credibility. First, the experience of being discredited is a harm in itself. Second, in Lillian's case there is also the harm to society caused by the failure to confine or punish a man who would rape his own daughter. Finally, there is the implication that for women to be believed, they must conform their behavior to create the outward appearance that they are worthy of being believed. For Maggie, this task proves impossible because, as Elliot shows, her fundamental integrity is at odds with the need to "cover" her intellectual curiosity in favor of demure, trustworthy behavior. For Lillian, it may have been equally impossible to conform. As a foster child at odds with her adoptive family, she may have had few options other than to become a ward of the state or to work as a prostitute.

In Elliot's novel, Maggie's aunts compare her to a gypsy because she is fanciful and dark-skinned, but for Maggie the possibility of credit remains only if she will conform her behavior to the demands of her society. A starker credibility problem belongs to the gypsies, societal "others" in the novel, who have no such opportunity to shape their own credibility through behavior. Their status alone is enough to discredit them. The novel thus shows in microcosm that whiteness was a necessary, though not sufficient, condition for possessing virtue. Similarly, African American women in the United States confront unique prejudices that inform a cultural perception that they lack credibility. They have been described as "so far removed from the mythical norm" of the "believable, reasonable person" that their "very existence is deviant."[44] Historically, as women of color, African American women could not conform to the ideals of female sexual virtue that were essential to women's credibility for the simple reason that they were not white. African American woman were and are stereotyped in ways that suggested that they cannot possess chastity, the linchpin that would render a woman worthy of belief.[45]

p. 594 These stereotypes, even as they have driven perceptions of African American women's credibility, have no discernable connection to truthfulness itself. Rather, they reproduce and reinforce cultural narratives about women's integrity. Familiar typecasts of African American women as asexual mammies or hypersexual jezebels serve to represent them as apart from and outside the narrative of chaste behavior associated with female truth-telling.[46] Notable examples of the operation of these stereotypes are not difficult to find in recent cultural memory. Anita Hill's reception when she accused Clarence Thomas of sexual harassment and Desiree Washington's treatment after alleging that she was raped by Mike Tyson are two such well-documented examples. More recently, as part of the #metoo movement which has inspired women (and some men) to speak about instances of sexual harassment and assault by powerful men, allegations by women of color have been treated with greater skepticism, even by the movement's proponents. As one article noted, the scrutiny reserved for women of color contributes to "an implicit message that believability … [is] reserved only for [white] women."[47]

Credibility tends to become a topic of conversation and scholarly attention when there are high-profile accusations of rape or sexual misconduct,[48] but what is less recognized is that the lessons learned from these cultural moments are generalizable. Across contexts, we perceive others in light of assumptions about whether "people like [them] are trustworthy about things like this in relation to people like [us]."[49] The same skepticism that greets sexual assault claims by women of color is present in other aspects of their lives because credibility is to an extent always dependent on narratives about social groups that allow us to generalize to broader conclusions. In a society rife with prejudicial stereotypes, therefore, credibility will inevitably be a product of problematic assumptions. Indeed, Fricker argues that prejudices and their accompanying “cognitive commitments” may outlive the beliefs that created them.[50] The continued use of convictions for prostitution to impeach the credibility of female witnesses may be one such commitment that endures despite shifting beliefs about the centrality of chastity to a woman’s fundamental integrity.[51]

Distortions of credibility are pervasive, often subtle and difficult to recognize. It takes careful probing to identify the drivers behind everyday instances where a person’s perceived lack of credibility is a function of prejudice. Marilyn Yarbrough, a former law p. 595 ↳ school dean, tells the story of being disbelieved by her own attorney when her account of the condition of property that was part of a civil dispute differed from that of the opposing party. This type of almost casual disbelief is no doubt extremely common, yet it is not generally considered newsworthy or tractable as a scholarly matter. For Yarbrough, it prompted an article-length examination in which she drew a direct link between the reality that as an African American woman, she was “particularly and peculiarly susceptible to being disbelieved” and the negative stereotypes discussed above.[52] The larger point is that even in a situation unrelated to sexual morality, credibility is a product of cultural norms and stereotypes that have little obvious connection to truth. Further, for members of certain groups who suffer from credibility distortions, even acquiring a prestigious professional identity associated with credibility will not be enough to overcome the power of the stereotype.

More so than any other group, African American men are likely to be discredited in court through our impeachment rules. Racially skewed incarceration rates combined with the American legal system’s continued focus on prior convictions as credibility markers make African American men disproportionately likely to face potential impeachment with prior crime evidence. Calvin Willis is one such man, and the story of his trial is instructive. In 1981, Willis was twenty-two, married with a second child on the way, and by his own account embarking with energy and optimism on a new career.[53] This life would be ended when he was arrested for the brutal assault and rape of an eleven-year-old mentally impaired girl who lived near him in Shreveport, Louisiana. The girl, left alone overnight with two other younger children, was incoherent when the mother of the other two girls found her bruised and bloody the next day. The only details she and the other girls could provide were that her attacker wore a cowboy hat and cowboy boots, was big and ugly, and had a beard. It is not entirely clear why the police focused on Willis, who lived nearby, but his name may have been suggested by the woman who had been caring for the child on the night of the rape. Willis had been out with friends and then at home with his wife for the entire night of the assault, facts corroborated by the friends and his wife. Nevertheless, he was arrested and charged with the crime.

Willis’s attorney was so convinced of the weakness of the government’s case that he advised Willis to opt for a bench trial. At that trial, nearly every prosecution witness contradicted statements they had made earlier and the girl’s caretaker could not produce a consistent account of whether she knew Willis or where she got his name. The victim, too upset to properly take her oath, answered “yes” indiscriminately to many questions, no matter who was asking. When asked about a photo array that detectives claimed to have shown her but then lost, she explained that the detective showed her pictures and “told me to pick the ones that didn’t have a full beard.”[54] She also said the p. 596 ↳ detective told her to “pick the one who did it to you,” and that she had said, “neither one of them.”[55] She could not identify Willis in the courtroom as her attacker. At the crime scene, the attacker had left a pair of size 40 boxer shorts. Willis wore a size 29. At the time, the only forensic testing available showed that Willis’s blood type, which is very common among African Americans, was consistent with the blood type of physical evidence found at the scene.[56]

In a cross-examination that spans thirty transcript pages, the prosecutor reserved for last a barrage of questions about Willis’s prior convictions, all of which were petty misdemeanors, including drunkenness, criminal property damage, theft, and remaining in a place after being ordered to leave.[57] Willis could not recall some of the instances, a fact the prosecutor highlighted in closing to suggest that Willis was unreliable.[58] The overall impression left after the extensive questioning about his record was that Willis was a criminal, a bad egg whose claim of innocence should not be believed despite the shockingly weak case against him. The trial judge convicted and sentenced Willis to life in prison. Twenty years later, after numerous failed appeals and petitions for post-conviction relief, he finally succeeded in having DNA evidence from the crime scene tested. The results showed conclusively that he could not have been the assailant, and he was freed. The man who did brutally rape the eleven-year-old girl has never been brought to justice.

The generalization that prior criminal activity means a person is less credible may reflect a cultural belief about which people we want to trust. Yet, given the persistent distortions in arrest and incarceration rates for African American men as compared with others in the country, this connection between convictions and a lack of credibility cannot help but carry a valance of prejudice. For example, Calvin Willis's own history of petty convictions may well reflect discriminatory policing. Nonetheless, the prosecutor capitalized on that history, making it the capstone of his cross-examination and a feature of his closing.

Despite the distance we have now from a time when African Americans could not testify by virtue of the color of their skin, "race is still a factor in credibility determinations."[59] And while some of the ways in which race comes into play—through appearance or speech patterns, for example—may be unaddressed by the formal rules, it is clear that the rules themselves have entrenched a definition of credibility that is not race-neutral. For many African American men, in particular, it will never be possible to meet the performative demands of credibility jurisprudence. The law is too omnipresent in certain communities for African American men to avoid contact with the criminal justice system, contact that all too often generates a criminal record. Finally, while there is ample reason to believe prior convictions tarnish credibility in the eyes of laypeople, there is simply no evidence that people with prior convictions are less likely to tell the truth.

32.4 Conclusion

The drive for narrative coherence is both powerful and profound as an explanatory theory for the legal approach to credibility in America. As Rex Ferguson writes, "in realism, narrative is … synonymous with coherence."[60] This observation offers a key insight not only into realist fiction, but also into the American legal system's ongoing love affair with embodying credibility using social proxies. As the US Supreme Court wrote in *Old Chief*, the very moral force of the criminal trial depends upon each side's ability to tell "a colorful story with descriptive richness."[61] Under this description, trials are most certainly not Aristotelian forays into an "abstract premise, whose force depends on going precisely to a particular step in a course of reasoning."[62] Rather, as the Court put it in *Old Chief*, trial evidence "has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict."[63] This narrative is important, the Court explained, "not just to prove a fact but to establish its human significance, and so to implicate the law's moral underpinnings and a juror's obligation to sit in judgment."[64]

It is this perceived need for the moral authority of a certain kind of narrative coherence that keeps evidence law so focused on the "bad eggs." If in life we pick and choose contextual information to inform our credibility judgments, how coherent could the law's fictive project claim to be if it deprived fact-finders of similar clues? More pointedly, in a country still grappling with the aftermath of slavery and Jim Crow and in which women are still not afforded constitutionally protected equal rights, it may seem self-evident to those in power that the realist project of a trial depends on knowing socially damaging facts about certain people as witnesses.

The uniqueness of the US approach to credibility impeachment becomes more apparent when US law is compared to that of England, which provided the source material for America's approach to credibility. English judges have determined that the probative value of defendants' prior convictions for truthfulness is *de minimis* as compared with jurors' own likely conflation of the question of guilt with credibility.[65] By this logic, jurors will believe a defendant they believe to be innocent and disbelieve a defendant they believe to be guilty. The question of credibility therefore collapses into the question of guilt. For this reason, UK defendants generally cannot have their credibility impeached with prior crimes. Yet, the same logic has found no purchase in the United States.

p. 598 In marked contrast to the United Kingdom's approach, US evidence law adds depth and color to the reconstruction of events with an inquiry into whether a witness *should* be believed. At the same time, it offers an accompanying fiction, that this evidence enhances the trial narrative with information about a witness's propensity for truthfulness. This fictive overlay suggests a degree to which American courts would like witness impeachment to seem more Aristotelian—more the product of cold logic than hot-blooded, often biased judgments based on gender, color, social status, or particularities of a person's past encounters with the law. Yet, impeachment rules that originated as status-based disqualification of witnesses continue to draw upon stock narratives about the truth of particular types of people, most notably criminal defendants.

As I have described in this chapter, this approach to credibility comes with considerable costs. It imposes additional penalties on those who are unable or unwilling to conform their behavior in ways that will prevent their credibility from being impeached at trial. It also has the potential to distract the fact-finder from more salient information and thus to cause inaccurate judgments. Finally, the insistence that credibility impeachment is simply a rational approach to finding the truth is wrong, a kind of fiction that covers what is really going on with a resulting loss of transparency.

Credibility impeachment in the law purports to guide—and should further—a search for truth. Impeachment rules that identify lies told in the moment maintain a clear focus on that goal. Our rules that search for liars, however, tell us less about truth than they do about cultural intuitions about who should and should not be believed. Those intuitions may be both efficient and useful in some settings, but they also open the door to a range of prejudices that can distort credibility assessments and lead to inaccurate fact-finding and unjust results. A necessary first step toward rectifying some of the more pernicious, distributively unequal, and often impossible demands that US credibility rules create is to be realistic in our assessment of this area of law. We should look behind the fiction that credibility and truthfulness are one and the same and confront the narratives about personal worth that lie at the core of this doctrine.

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2 Miranda Fricker, *Epistemic Injustice: Power & The Ethics of Knowing* (Oxford: Oxford University Press 2007), 46 (quoting Thomas Hobbes, *Leviathan*).

3 Julia Simon-Kerr, “Credibility by Proxy,” *George Washington Law Review* 85 (2017): 152–225. Looking for lies told in the moment is a fairly intuitive question of relevance. American evidence rules facilitate it by admitting evidence of witness bias, inconsistent statements, or inconsistencies between witnesses and other evidence. Jurors may also rely on witnesses’ own performances in court, making much (or nothing) of a blush, a wrinkled or nonexistent suit, or a weeping family member.

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46 These stereotypes are commonly grouped into three primary categories: first, the "mammy" stereotype, which suggests a submissive, asexual domestic worker, who is nevertheless fundamentally an outsider and untrustworthy; next the "jezebel" stereotype, which suggests a seductress and a woman incapable of chastity; and finally the "sapphire"

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48 The #metoo movement is a case in point, generating headlines such as “Do We Believe Women Yet?” Clyde Haberman, *The New York Times*, Oct. 17, 2017.

49 Fricker, *Epistemic Injustice*, 36.

50 Ibid., 37.

51 In California, Texas, Illinois, Massachusetts, and New York, among other states, prostitution convictions are admissible for impeachment either as crimes of moral turpitude or because courts have found them relevant and probative criminal convictions punishable by more than one year in prison. Simon-Kerr, “Credibility by Proxy,” 200–201.

52 Yarbrough and Bennett, “Cassandra,” 266.

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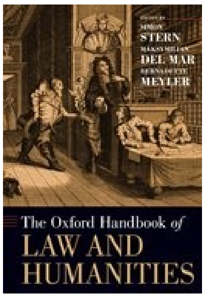

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CHAPTER

33 Laws of Sex, Changed

Noa Ben-Asher

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Abstract

The dramatic legal and social developments in the domains of sex, gender, and sexuality in the last several decades are often understood as progress. But this is not the whole story. This chapter presents these developments through a genealogy in which “bad” legal actors have turned into “good” legal actors. Three factors have facilitated this transition: (1) development of constitutional legal rights; (2) shifts in medical expertise; and (3) emergence of rhetoric of pity for allegedly suffering individuals. The chapter demonstrates this insight by examining three sites of social and legal change: one involving reproduction, one involving homosexuality, and one involving gender identity. In each of these domains, individuals or acts that were once labeled legally criminal are now considered, under the law, as dignified or morally praiseworthy. First, many types of reproductive technologies (such as sperm and egg donations) that were once strictly prohibited have been legalized and are now encouraged. Second, homosexuality, once condemned through criminal sodomy laws, is now understood by the Supreme Court, in the context of marriage, as dignified and respectable. Third, nonconforming gender identities, once criminalized in various ways, are gradually gaining anti-discrimination protections and social acceptability. Each of these social and legal transformations began in criminal prohibition and ended with an extension of liberal rights to individuals or couples. The chapter closely examines how, in these three transformations, Judeo-Christian values such as pity and dignity have seeped into current social and legal consciousness. The chapter concludes with some general thoughts on queer legal studies.

Keywords: queer theory, gender, sexuality, reproductive technologies, same-sex marriage, gender identity, transgender, intersex

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33.1 Introduction

> "All good things were formerly bad things; every original sin has turned into an original virtue."[1]
>
> —Friedrich Nietzsche

AND so it is. Human sexuality is a site of great moral and legal transformations.[2] This chapter tells the story of three such transformations that have unfolded in the United States since the mid-twentieth century: one involving reproduction, one involving homosexuality, and one involving gender. In each of these stories, criminals have become dignified and morally praised.[3] In these years, reproductive technologies that were once prohibited have been legalized and are even encouraged; homosexuality, once condemned through criminal sodomy laws, has been dignified through the right to marry; and nonconforming gender identity, once criminalized through prohibitions on cross-dressing, is gradually gaining anti-discrimination protections. Each of these transformations begins with a criminal prohibition and ends with an extension of liberal rights. What happened?

The simple and most obvious explanation for these transformations centers on an ongoing liberal p. 602 expansion of individual rights, a consequence of the feminist and the ↳ civil rights movements.[4] Indeed, in the United States, since the second half of the twentieth century, women, racial minorities, and sexual minorities have gradually scored legal victories.[5] But that is only a part of the story. My work reveals and critically examines the complicated dynamics of three aspects in these genealogies of sexual morals: (1) legal rights; (2) a transfer of authority from religion to medical science; and (3) collective pity for allegedly suffering others. A few words on each.

The most visible aspect of the shift in sexual morality in the United States has involved an extension of legal rights in domains of reproduction, gender, and sexuality. Through the development of privacy and liberty doctrines from *Griswold* to *Lawrence*, the idea that the government has no business regulating consensual adult sex in domestic settings was established.[6] Likewise, access to reproductive technologies such as sperm donation, egg donation, and gestational surrogacy, have often been grounded in concepts of reproductive autonomy or the right to parent.[7] Individuals have also benefited from legislation and judicial decisions that prohibit discrimination based on gender nonconformity.[8] Ongoing expansion of legal rights is a key feature of transformations of sex, gender, and sexuality in the last several decades.

The expansion of legal rights has involved a weakening of religious authority on issues relating to sex, gender, and sexuality and its replacement with *medical and scientific authority*. This occurred in all three domains discussed in this chapter. For example, the shift in the legal classification of sperm donations from adultery to "cure for infertility" involved a shift in authority from Judeo-Christianity to medical science when physicians were authorized to use donor sperm. Likewise, the legal extension of rights to homosexuals increased after, in 1973, the American Psychiatric Association (APA) voted to remove homosexuality from the *Diagnostic and Statistical Manual of Mental Disorders* (DSM), a catalog of psychiatric p. 603 disorders[9]; and the rights of transgender individuals ↳ often depend on the psychiatric diagnosis of gender identity disorder (now gender dysphoria). At the legal and social levels, medical experts became the new source of truth and knowledge about sex, gender, and sexuality, and they replaced the old source: religious authority.

The third aspect in this transformation is the rhetoric of pity toward the individual or group at stake. As Martha Nussbaum observed, political emotions play a significant role in a society's quest for social justice.[10] My work has explored and criticized the rhetoric of pity in all three transformations discussed here. Reproductive technologies were legally adopted when experts and lawmakers emphasized that infertile people suffer and are in need of medical cure.[11] Homosexuality was decriminalized—and later marriage rights granted—with an explicit rhetoric of shame, suffering, and social stigma of marginalized same-sex couples and their children. The inability to enter the institution of marriage was deemed too painful to bear.[12] Transgender individuals are often portrayed as suffering because they are in the "wrong" body.[13]

Table 33.1 visualizes the genealogy of sexual morals presented in this chapter.

Table 33.1 Summary of genealogies of sexual morals

	Moral shift	*Legal shift*	*Authority Shift*	*Sentiment Shift*
Reproductive Technologies	BAD TO GOOD	From criminal prohibitions to legally enforceable baby-making contracts	Religion to medical science & human rights	Condemnation to pity for those suffering from infertility
Homosexuality	BAD TO GOOD	Criminal Sodomy to Dignity in Marriage	Religion to Medical Science & Human Rights	Condemnation/ disgust to pity for those suffering from homosexuality and social stigma
Gender Nonconformity	BAD TO GOOD	From criminal prohibitions to limited recognition and protections	Religion to medical science & human rights	Condemnation/ disgust to pity for those suffering from gender dysphoria

33.2 Reproductive Technologies

Today, the use of reproductive technologies is widespread in the United States and is mostly legally permissible.[14] There are well-established markets for sperm, ova, and gestational surrogacy.[15] Individuals or couples can legally contract for all three.[16] But it has not always been so. Up to the 1950s, even a married couple in the United States could not turn safely to sperm donation because such transactions would be classified as crimes (adultery), and for all legal purposes the child would be considered illegitimate.[17] Also, until the 1990s, a married heterosexual couple in the United States could not turn safely to surrogacy because it was considered a crime (baby-selling), and the surrogacy agreement would be deemed to violate public policy and therefore void and unenforceable.[18]

A shift began around mid-twentieth century. Reproductive technologies gradually came to be perceived as a "cure for infertility," and their use consequently changed from a legal crime to legally enforceable transactions. These transactions began as socially "bad" and became socially "good." In this process, ideas about sex, gender, sexuality, morality, public policy, and medicine transformed. The idea of reproductive technologies as "cures for medical infertility" replaced the moral and legal condemnations of sperm donations and surrogacy. From the late 1960s on, sperm donations were legalized, state by state, as recommended treatments for male infertility. Later, since the early 1990s, egg donation and gestational surrogacy were gradually recognized as cures for female infertility. A growing idea of a "curing law" has shaped today's flourishing markets of baby-making. A medicalized understanding of childlessness—now known as infertility—replaced the former understanding of the technology as immoral or unethical.

The previous understanding of reproductive technologies such as sperm and egg donation as adulterous and as violating the sacredness of the family was grounded in a certain strand of Judeo-Christian traditionalism. Our current understanding of these technologies as cures for infertility is grounded in medical authority. As

Michel Foucault observed, as nation states grew, the size of the population increased, and reproduction, p. 605 health, and the happiness of citizens increasingly became issues for governmental concern and regulation.[19] The legal and medical paradigm indeed reflects the growth of ↳ management of individuals through a combination of medical experts, fertility clinics, technology, and rights. Medical authority has replaced the authority of Judeo-Christianity.

The legalization of reproductive technologies has also depended on the underlying assumption that infertile individuals are experiencing emotional pain as a result of childlessness. The assumption that individuals suffer from infertility has been prevalent in the medical literature on male and female infertility since the 1950s, and in case law and legislation that recognized the importance of access to these reproductive technologies. But although this assumption can be traced back at least to the Old Testament,[20] not all childless individuals suffer. Despite the partial replacement of religious authority with medical authority, the notion that childless individuals suffer and deserve pity has remained intact.

The division of labor between men and women in Judeo-Christianity also seeped into the legalization of baby-making markets. Men, in the process of legalization of sperm donation, were generally treated by courts as breadwinners; and women, as childbearers. Accordingly, since the 1960s, courts that abandoned the adultery framework expressed anxiety about financial support obligations for fathers.[21] Embracing sperm donations was a useful way for courts and legislatures to enforce fiscal responsibility of fathers. For women, by contrast, lawmakers and medical experts have strongly favored physical participation in the reproductive process, and full surrogacy (in which the surrogate carries a child produced from her own ova) continues to be prohibited.[22] In the 1990s, when lawmakers began to legalize ova donations and gestational surrogacy, they encouraged, and at times required, that intended mothers use their own uterus or ova in the process. The gestational surrogate was (and still is) considered a "carrier" who helps the genetic parents have *their own* biological child.[23]

These assumptions—that childlessness necessarily causes emotional suffering, that men ought to support their children, and that women ought to physically partake in childbearing—interestingly echo traditional and biblical perspectives on reproduction.[24] The packaging is new. The substance is not. From a moral framework of adultery and baby-selling, the twentieth century brought a shift in authority and a new attitude that medical science can—and ought to—cure infertility. But core ideas and values of Judeo-Christianity still prevail.

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33.3 Homosexuality

> AIDS, homosexual, gay, lesbian, you think these are names that tell you who someone sleeps with? They don't tell you that. No. Like all labels they tell you one thing and one thing only: where does an individual's sole identity fit in the food chain. In the pecking order. … Homosexuals are not men who sleep with other men. Homosexuals are men who in 15 years of trying can't pass a pissant anti-discrimination bill through city council. Homosexuals are men who know nobody and who nobody knows, who have zero clout.
>
> —Tony Kushner, *Angels in America*[25]

These words of the closeted, anti-communist, attorney, Roy Cohn, as portrayed by Tony Kushner in *Angels in America*, provide a realistic and painful portrayal of homosexuality in the 1980s. Considered against the recent Supreme Court decision in *Obergefell* on the right to marry,[26] one wonders how this legal culture has drastically changed, in only four decades, from viewing homosexuals as men who cannot pass an anti-discrimination bill, to viewing them as citizens with equal dignity and the right to marry?

Up to the end of the 1970s, homosexuality was considered a psychiatric disorder.[27] This had many legal implications. In 1967, for instance, in *Boutilier* v. *INS* the Supreme Court affirmed the deportation of an immigrant on the ground that the entry of those "afflicted with psychopathic personality" (including homosexuality) were barred from entering the United States.[28] A fascinating development in the status of homosexuality culminated in *Windsor* and *Obergefell*, when the Supreme Court invalidated section 3 of the Defense of Marriage Act (DOMA), which defined marriage as "only a legal union between one man and one woman,"[29] and held that denying same-sex couples the right to marry violates the freedom to marry and the Equal Protection Clause.[30] This was the peak of a moral metamorphosis of homosexuality: from a mental perversion that is subject to criminal laws[31] to dignified equal citizenship.[32] It is no coincidence that the terms "homosexual," "lesbian," and "bisexual" were not mentioned even once in the majority's decision in *Windsor*.[33] The full legal recognition of homosexuality also involved its ↳ erasure: the homosexual, once an p. 607 individual sodomite defined by illicit sex, is now a couple, defined by love and companionship.

From *Bowers v. Hardwick* to *Obergefell v. Hodges*, the Supreme Court, reflecting broader societal attitudes, shifted its approach to homosexuality in three key dimensions: (1) characterizing homosexuality; (2) morally evaluating homosexuality; and (3) deciding whether the state can engage in morals legislation.[34] Whereas the homosexual in *Bowers v. Hardwick* was characterized as an immoral "sodomite,"[35] in *Windsor* and *Obergefell*, the Court focused on a dignified "same-sex couple" when it declared that several states had "conferred upon [same-sex couples] a dignity and status of immense import."[36] Decade by decade, this moral and legal metamorphosis developed in four main phases in the jurisprudence of the Supreme Court. In the first phase, the "Immoral Sodomite Phase,"[37] homosexuality was understood primarily through the framework of illicit *sex acts* and was therefore morally rejected.[38] In the second phase, the "Equal Homosexual Class Phase,"[39] the homosexual was no longer understood as a sexual outlaw but as a member of a "class of citizens" whose exclusion from anti-discrimination protections is unconstitutional.[40] In the third phase, the "Free Intimate Bond Phase,"[41] sodomy laws were invalidated as the focus shifted to an enduring intimate bond.[42] Finally, in *Windsor* and *Obergefell* we entered the "Dignified Married Couple Phase."[43] These four phases mark the moral progression of what I have called "the legal homosexual."

Law school textbooks typically characterize gay rights as an incremental civil-rights process. This account sometimes overlooks the mystery of how homosexuality transformed over only a few decades to a place of moral dignity. This moral genealogy, I argue, was enabled by three main conditions: (1) desexualizing homosexuality; (2) privatizing homosexuals; and (3) rhetoric about coupling and reproduction. The gradual extension of constitutional rights correlates with seeing homosexuality as less about sexual acts and more about a class of people, an "identity" (LGBTQ); it involved recognizing the right to be free of government intervention in the private sphere; and the rhetoric shifted towards the protection of couples and kids. Homosexuals turned into "good" characters when they satisfied more traits associated with married, p. 608 reproductive heterosexuality.[44] ↳ This shift is embodied in Justice Kennedy's uses of the concept of "dignity," a word that appeared nine times in each *Windsor* and *Obergefell*.[45]

The leading emotion reflected in *Windsor* and *Obergefell* is pity for homosexuals and their children, who have allegedly suffered humiliation from marriage exclusions. The Defense of Marriage Act was understood by the Court to "demean[] the couple,"[46] "impose[] a disability on the class,"[47] and "humiliate[] tens of thousands of children now being raised by same-sex couples."[48] As *Obergefell* concludes, "their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right."[49]

It is important that we see that the legal transformation of homosexuality shares the three primary characteristics with the legal transformation of reproductive technologies: legal rights, reliance on psychiatric authority, and a strong emphasis on pity and suffering.

33.4 Gender Identity

As Eve Sedgwick sharply observed, the same DSM-III that, when published in 1980, did not include homosexuality as a psychiatric disorder, contained a new diagnosis: "Gender Identity Disorder of Childhood" (GID).[50] Gender identity of young boys became a site of cultural, legal, and psychiatric anxiety in the 1980s. Effeminacy in young boys and in men was of special concern to sex researchers.[51] Whereas in the genealogies of reproductive technologies and homosexuality potential criminals gradually turned into dignified and morally good legal characters, in the case of "gender identity," we are still the midst of an ongoing moral and legal metamorphosis.

This third legal transformation—the one involving gender—belongs in the genealogy of homosexuality. p. 609 Sex, gender and sexuality, as theorists have long observed, are ↳ connected at the core.[52] Anxieties about effeminate boys and masculine girls reflect the fragility of a heterosexual structure in which males are boys, females are girls, and desire flows from one sex to its perceived opposite. My work in this area has focused on how lawmakers, legal norms, advocacy, and social movements have articulated claims for individuals whose very existence challenged the male-female/man-woman dichotomy.[53]

While notions of femininity and masculinity have been around for much of Western civilization, the *idea of gender* as distinct from biological sex only appeared in the United States around mid-twentieth century. In those years, the idea of "gender role" became an important aspect in feminist claims for liberation from the domestic sphere and patriarchy.[54] Relatedly, sex researchers began to investigate the now famous nature/nurture debates. They interrogated whether gendered behavior is inherent or culturally taught by parents and society. Intersex and gender-nonconforming individuals were naturally of great interest to sex researchers in those years. Consequently, sex researchers developed and supported gender-affirming treatments for gender-nonconforming adults, and medical protocols for early medical intervention of intersex infants.[55]

Since the 1990s, legal advocates have achieved gradual success when making policy and legal claims on behalf of transgender and intersex individuals. They have challenged lawmakers, policymakers, and the rest of society to reconsider what had been taken for granted: the binary gender system. They have shown how oppressive this system can be for those who do not conform to the sex/gender binary. Individuals who identify as transgender or intersex have increasingly received, since the 1990s, more legal rights and social recognition.[56] Importantly, this trend of growing recognition has been heavily mediated through medical, psychiatric, and scientific expertise.

The struggles of intersex and transgender individuals for rights have involved various social and legal issues. For intersex individuals, the main struggle has focused on ending unnecessary, cosmetic, early surgeries and medical intervention on young infants and children whose genitals at birth did not match societal expectations.[57] For transgender individuals, legal struggles have involved identification papers p. 610 (birth certificates, ↳ drivers' licenses, passports, etc.); discrimination in the workplace and schools (including bathroom access); prisoners' rights; access to medical care; parental rights; and protection from hate crimes.[58] Both groups have relied heavily on medical experts to promote these legal and policy goals.

Advocates for transgender rights have often relied on the psychiatric diagnosis of GID or gender dysphoria in the quest for legal recognition.[59] Courts mostly rely on the psychiatric diagnosis without doubting its accuracy or authority,[60] while advocates often use it for strategic reasons.[61] In our times, psychiatric terminology grants intelligibility to individuals that courts and other lawmakers may otherwise not understand or relate to. Thus, since the 1950s, some physicians, sex researchers, surgeons, and endocrinologists became allies and advocates for transgender people.[62] Among other things, they have advocated for, and often provided, gender-affirming treatments ranging from hormone treatments to talk therapy to surgeries. These experts also regularly testify in a range of anti-discrimination cases, explaining to courts the meaning of transgender identity. The role of psychiatric experts has been to explain to courts and other lawmakers why some individuals do not identify with their birth-assigned gender, and why they need legal protections. As Judith Butler observed, however, while medical experts have been a useful source for more freedom for transgender people, they have also been a source of un-freedom.[63]

Intersex individuals and allies have also relied heavily on medical experts in a quest for legal and social recognition since the Intersex Society of North America (ISNA) was formed in 1993 with the mission to "end shame, secrecy, and unwanted genital surgeries for people born with an anatomy that someone decided is not standard for male or female."[64] ISNA originally defined "intersex" as an anatomical condition and a p. 611 biological variation, which is "neither a medical nor a social pathology."[65] In 2006, after ↳ much pressure, the European and American endocrinological societies published a consensus statement according to which the nineteenth-century term "hermaphrodite" and the twentieth-century term "intersex" are no longer to be used. Instead, "congenital conditions in which development of chromosomal, gonadal, or anatomical sex is atypical" should be called "disorders of sex development" (DSDs). DSD has replaced "intersex" in medical guidelines, pamphlets, advocacy and support websites, and legal challenges.[66] As with transgender rights, the growing recognition that early intervention on children with intersex is harmful and unnecessary has depended on medical-scientific knowledge, and has therefore required *more medicalization* of kids with intersex conditions. Critically, to gain access to legal rights, *intersex was transformed into DSD.* The first challenge to intersex surgeries in the United States (in 2013) characterized intersex as a medical disorder.[67]

Narratives about the suffering of transgender and intersex people have played a prominent role in this transformation of laws and morals. It is through their perceived suffering that many intersex and transgender subjects are becoming intelligible in public discourse. Lawmakers and policymakers often justify transgender rights with suffering "in the wrong body."[68] Courts, relying on psychiatric authority, often narrate transgender individuals as "suffering" from gender dysphoria. The road to recognition has involved expressions of pity toward gender minorities. Intersex advocacy as well has focused on the suffering inflicted by physicians on intersex patients, and in the few cases where these legal claims have succeeded, suffering and pity played a significant role.[69]

Some have referred to our times as a "gender revolution."[70] Indeed, since the 2000s, state and federal policymakers and lawmakers have enacted gender-based protections, many educational institutions are showing greater sensitivity to gender identities, parents are more informed about transgender and intersex conditions, and there is more transgender and intersex visibility in popular culture with shows like p. 612 *Transparent* and public figures coming out as transgender.[71] Consequently, many individuals experience ↳ less secrecy and shame about gender and sexuality, and it is no surprise that younger generations in much greater numbers are manifesting less traditional gender choices.

Transgender and intersex individuals, since the mid-twentieth century, have been under the intense gaze of sex researchers, physicians, pediatricians, endocrinologists, and psychiatrists. Medical knowledge and expertise have defined their very existence. To this day, scientists are studying the human brain to try to understand the causes for gender-nonconforming behavior.[72] For intersex and transgender individuals, the path to becoming "good" has involved alliances with medical knowledge and authority. Corresponding with the legal and moral genealogies of reproductive technologies and homosexuality, in the case of "gender," medical-scientific experts have replaced traditional authority of religion. The mark of moral condemnation was removed, and a new mark was granted: a medicalized identity. It is through that medicalized identity—DSD for intersex individuals, and gender dysphoria for transgender individuals—combined with expressions of pity that we recognize the twenty-first-century legal subjects of rights.

33.5 What’s Queer About Queer Legal Studies?

My own work in the area of queer legal theory has so far focused on how human behaviors once considered “bad” and morally undesirable shift to being considered “good” and socially desirable. It has explored the fluidity and instability of categories such as gay and straight, man and woman, transgender and cisgender.[73] It has been inspired by the work of Michel Foucault as it traces historical developments of gender and sexuality, underscores the role of public health and medical science as emerging fields of knowledge and governance, and is critical toward identity politics.[74] Relatedly, my approach to legal rights has been shaped by a body of work known as critical legal studies, which offers critical stances toward the faith that focusing on legal rights can lead to robust social justice.[75]

p. 613 In a legal culture that is split along liberal/conservative lines, and has been so for decades, the queer legal theorist is always at risk of being out of line. Queer legal theorists are suspicious. Conservatives will treat them as liberal (because the writing often signals strong anti-conservative sentiments), and liberals will treat them as not liberal enough (because the writing often signals lack of interest in rights advocacy or strictly policy questions). Nonetheless, precisely *because* queer legal studies does not participate from the inside in liberal versus conservative debates, it has a diagnostic potential to surpass our times and maintain relevance for future generations.

Queer legal studies investigates how sex, gender, and sexuality are produced through legal discourses and other forms of knowledge. I propose that there are three interrelated characteristics that work in queer legal studies typically entails. The first involves what questions the work posits; the second involves methodology; and the third involves a particular attitude toward paradox. A combination of these three factors, in my view, distinguishes queer legal studies from other legal scholarship on sex, gender, and sexuality. I will briefly elaborate these three characteristics.

First, the questions posed by queer legal theory are not per se normative or policy driven. While the subject matter of queer legal studies obviously involves many normative questions, legal materials, and institutions, the primary question of queer legal studies is *not* “what is the correct law or policy?” on a given matter. Instead, queer legal theorists come to their subject matter with no conviction, and with pure curiosity and scientific joy. Avital Ronell has called this “the test drive,” following Friedrich Nietzsche’s *Gay Science*.[76] For Nietzsche and Ronell, under this scientific experimental approach, the “gay scientists” come to their questions with the willingness to change themselves through the process of investigation; with the willingness to take chances and face the truth wherever it may lead. Thus, as I see it, the main questions for queer legal studies today are not in the domain of should or ought (what should or ought the law be?). The questions are in the domain of the “how?” *How* has homosexuality changed from deviant to respectable? *How* have sperm donations become medically and legally desirable? *How* did intersex and transgender politics come into conflict? And so on. The “how” question open the gates of inquiry and curiosity; it is also risky because it approaches the subject matter without a specific policy-based agenda. The “how” question suspends policy and morality and investigates the narratives as they appear in a body of law.

Second, once the “how” question has been posited honestly and with no agenda to reach a certain result, the methodology of queer legal studies may vary. It can take, for instance, a Foucault-style genealogical approach. Namely, given that morals and laws evolve, and have evolved for centuries, one productive methodology for queer legal studies is to trace the origins of a legal rule or domain, while examining forms p. 614 of knowledge and power that operated on it through that journey from point A to point B.[77] ↳ Another effective methodology comes from literary studies, in which one closely reads one or more texts, slowly revealing the texts’ internal conflicts, anxieties, word slippages, and so on. Judith Butler’s work has inspired many scholars in law and humanities to dissect texts in this manner.[78] In both of these methodological approaches, scholars suspend their own ethical and moral views and interrogate the texts themselves.

Third, and perhaps most importantly, the work of queer legal studies embraces, rather than rejects, paradox. Queer legal theorists seek and elaborate the paradox. They feel at home in the paradox because they know that meaning-making and cultural events are revealed in paradoxical moments. Comfort in the presence of paradox is a difficult task because, as legal scholars, many of us are committed to constitutional rights and to social justice. The work of queer legal studies digs deep into the paradoxes that our quests for legal rights produce. I have elaborated these paradoxes throughout my scholarship.[79] Paradoxes produced at the intersections of constitutional rights, medical scientific expertise, and shifting views of morality provide fascinating scenes for queer legal studies.

33.6 Conclusion

A combination of legal rights, medical expertise, and pity for allegedly suffering individuals and couples have been driving forces in the changing laws of sex, gender, and sexuality. Legal rights, medical diagnosis, and pity for sufferers have effectively become preconditions for intelligibility of many legal subjects today. And while the current states of reproductive technologies and LGBT rights are often thought of as "revolutions," they are not. So far, my examinations of changes in the laws of sex have revealed a consistent *replacement* in the source of authority (medical science has replaced Judeo-Christianity) alongside a somewhat paradoxical reinforcement of many existing values of Judeo-Christianity. Most explicitly, the suffering of others, a core component in Judeo-Christianity, has tremendously shaped our understanding and administration of legal rights in areas of reproduction, gender, and sexuality. Thus, paradoxically or not, we have rejected religion as a matter of authority, and God as our lawmaker, but we have embraced core values of Judeo-Christianity. Two decades into the twenty-first century, these values dominate our changing laws of sex, gender, and sexuality.

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Notes

1 Friedrich Nietzsche, *On the Genealogy of Morals*, ed. Walter Kaufmann (New York: Vintage, 1989), 9.

2 For some key foundational texts on this point, see, for example, Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity*, 2nd ed. (New York: Routledge, 1990); Michel Foucault, *The History of Sexuality*, trans. Robert Hurley (New York: Vintage, 1990); Gayle S. Rubin, “Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality,” in *Pleasure and Danger: Exploring Female Sexuality*, ed. Carole S. Vance (Boston: Routledge, 1984): 267–319; Eve Kosofsky Sedgwick, *Epistemology of the Closet* (Berkeley: University of California Press, 1990).

3 Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

4 Some have referred to the liberal quest for rights and the conservative opposition to these rights as the “culture wars.” See Andrew Hartman, *A War for the Soul of America: A History of the Culture Wars* (Chicago: University of Chicago Press, 2016).

5 For example, Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. (2012); Pregnancy Discrimination Act of 1978, 42 U.S.C. §§ 2000e et seq. (2012); Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 (2012); Obergefell v. Hodges, 135 S. Ct. 2584 (2015); United States v. Windsor, 570 U.S. 744 (2013); Lawrence v. Texas, 539 U.S. 558 (2003); Romer v. Evans, 517 U.S. 620

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6 *See* Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Lawrence v. Texas, 539 U.S. 558 (2003).

7 Noa Ben-Asher, "The Curing Law: On the Evolution of Baby-Making Markets," *Cardozo Law Review* 30 (2009): 1885–1924.

8 For example, Schroer v. Billington, 424 F. Supp. 2d 203 (D.D.C. 2006); Lusardi v. McHugh, EEOC Decision No. 0120133395, 2015 WL 1607756 (2015); Macy v. Holder, EEOC Decision No. 0120120821, 2012 WL 1435995 (2012).

9 *Diagnostic and Statistical Manual of Mental Disorders*, 2nd ed., Sixth Printing (Washington: American Psychiatric Association, 1974) (hereinafter DSM-II). See further https://www.aglp.org/gap/1_history/#declassification; see also Eve Kosofsky Sedgwick, "How to Bring Your Kids up Gay," *Social Text* 29 (1991): 18–27 (discussing the shift in the DSM from depathologizing of homosexuality to pathologizing gender identity disorder).

10 Martha C. Nussbaum, *Political Emotions: Why Love Matters for Justice* (Cambridge, MA: Belknap Press of Harvard University Press, 2013).

11 For example, Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

12 United States v. Windsor, 570 U.S. 744 (2013).

13 Noa Ben-Asher, "Paradoxes of Health and Equality: When a Boy Becomes a Girl," *Yale Journal of Law & Feminism* 16 (2004): 275–312.

14 Ben-Asher, "Curing Law."

15 Ibid. See also Carol Sanger, "Developing Markets in Baby-Making: In the Matter of Baby M," *Harvard Journal of Law & Gender* 30 (2007): 67–97; Kara W. Swanson, *Banking on the Body: The Market in Blood, Milk, and Sperm in Modern America* (Cambridge, MA: Harvard University Press, 2014).

16 Sometimes forum shopping is necessary, especially for gestational surrogacy. See Ben Asher, "Curing Law," 1920–1921.

17 *See* Gursky v. Gursky, 242 N.Y.S.2d 406 (Sup. Ct. 1963) (holding that artificial insemination by third-party donor without husband's consent is adultery); Abajian v. Dennet, 184 N.Y.S.2d 178 (Sup. Ct. 1958) (preventing mother from speaking about child's conception, to avoid the child's status of "bastard").

18 *See In re* Baby M, 537 A.2d 1227 (N.J. 1988).

19 Michel Foucault, *The Birth of Biopolitics: Lectures at the Collége de France, 1978–1979*, ed. Michel Senellart, trans. Graham Burchell (New York: Palgrave Macmillan, 2011).

20 *Book of Genesis* (describing Sarah's suffering from infertility, as well as Rachel's suffering until she gives birth to Joseph and Benjamin).

21 Gursky v. Gursky, 242 N.Y.S.2d 406, 411 (Sup. Ct. 1963); People v. Sorensen, 437 P.2d 495 (Cal. 1968) (dismissing the adultery framework and holding that a husband is the lawful father of a child born to his wife through the use of donor insemination, and "his conduct carries with it an obligation of support within the meaning of section 270 of the Penal Code").

22 Ben-Asher, "Curing Law"; *In re* Baby M, 537 A.2d 1227 (N.J. 1988).

23 Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

24 Consider the mythic expulsion of the first two humans from the Garden of Eden. Eve was condemned to "bring forth children" in sorrow, Adam, to sweat for the procuring of bread. Gen. 3:16–3:20 (King James). After condemning the serpent and its seed to eternal conflict with the woman and her seed, God says to the woman, "I will greatly multiply thy sorrow and thy conception; in sorrow thou shalt bring forth children." And to Adam, God says, "[I]n the sweat of thy face shalt thou eat bread."

25 Tony Kushner, *Angels in America, Part Two: Perestroika* (New York: Theatre Communications Group, 1993), 51.

26 Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

27 DSM-III.

28 Boutilier v. INS, 387 U.S. 118, 118–119 (1967).

29 United States v. Windsor, 570 U.S. 744, 752 (2013).

30 *Id.* at 769–770.

31 For example, *Boutilier*, 387 U.S. at 118–119.

32 *See* United States v. Windsor, 570 U.S. 744, 769 (2013); Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

33 *See generally* United States v. Windsor, 570 U.S. 744, 769 (2013).

34 Namely, can the state regulate behavior that does not harm others, based solely on moral disapproval by the majority?

35 Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

36 United States v. Windsor, 570 U.S. 744, 792 (2013) (quotations omitted); *see also* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

37 *Bowers*, 478 U.S. 186.

38 *Bowers*, 478 U.S. 186, *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

39 Romer v. Evans, 517 U.S. 620 (1996).

40 *Id.*

41 *Lawrence*, 539 U.S. 558.

42 *Id.* (recognizing same-sex intimacy and declaring that states can no longer engage in pure morals legislation.)

43 *See* United States v. Windsor, 570 U.S. 744 (2013). Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

44 See also Rubin, "Thinking Sex."

45 United States v. Windsor, 570 U.S. 744 (2013); Obergefell v. Hodges, 135 S. Ct. 2584 (2015). I have argued that for three reasons this should be viewed as a "weak dignity." First, it is understood by the Court to be conferred by individual states through marriage licensing. Second, it is far narrower than theories of dignity offered by contemporary moral and legal philosophers. Third, it assumes that exclusionary marriage laws had seriously injured and humiliated same-sex couples and their children. The genealogy of homosexuality is a genealogy of morals. At the public-political level it has involved multiple institutional players: law, psychiatry, social sciences, politics, religion, activism, art, music, and many other human domains and activities. See Noa Ben-Asher, "Conferring Dignity: The Metamorphosis of the Legal Homosexual," *Harvard Journal of Law & Gender* 37 (2014): 243–284.

46 *Windsor*, 133 S. Ct. at 2694.

47 *Id.* at 2695–2696.

48 *Id.* ("[DOMA] makes it even more difficult for the children to understand the integrity and closeness of their own family").

49 *Obergefell*, 135 S. Ct. at 2607–2608.

50 Sedgwick, "How to Bring Your Kids Up Gay," 18 (citing *Diagnostic and Statistical Manual of Mental Disorders 3d ed.* (Washington, D.C.: American Psychiatric Association, 265–266).

51 Ibid.

52 Butler, *Gender Trouble* (inspiring a body of writing elaborating this topic).

53 Noa Ben-Asher, "The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties," *Harvard Journal of Law & Gender* 29 (2006): 51–98; Ben-Asher, "When a Boy Becomes a Girl"; Noa Ben-Asher, "The Two Laws of Sex Stereotyping," *Boston College Law Review* 57 (2016): 1187–1237.

54 Ibid.

55 Ben-Asher, "Necessity of Sex Change."

56 Ibid.

57 An estimate of 2 percent to 0.001 percent of infants are born with anatomy and/or chromosome patterns that do not fit typical definitions of male or female. In the 1950s, sex researcher John Money and fellow researchers at Johns Hopkins devised a mode of treatment for intersexuality based on a psychosocial gender identity theory, which alleges that gender identity is "fixed" early in life, and thus "standard" anatomy must match that gender identity to facilitate development. That is, for boys, an adequate sized penis; for girls, a not too large clitoris. Money and colleagues authored protocols for treating individuals with intersex, and that became the prominent course of treatment for intersexed infants from the 1950s until the turn of the twenty-first century. While in intersex genetic males the focus was on the "adequate phallus," in intersex genetic females the guidelines prescribed the preservation of reproductive capabilities, and advised that "infants raised as girls will usually require clitoral reduction." Ibid.

58 I have observed that intersex and transgender advocates have developed legal claims that we can understand in terms of negative and positive liberties. The legal claim for freedom from early intersex surgery is a claim for individual negative liberty of non-interference with one's body. Many claims for transgender rights are claims for positive liberty—for federal-state action for the welfare of the individual. Ben-Asher, "Necessity of Sex Change," 96–97. For definition of positive and negative liberty, see generally Isaiah Berlin, "Two Concepts of Liberty," in *Four Essays on Liberty* (Oxford: Oxford University Press, 1979), 118.

59 DSM-III, "Gender Dysphoria."

60 *See* Kosilek v. Spencer, 774 F.3d 63, 69 (1st Cir. 2014); Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1221 (10th Cir. 2007); Smith v. City of Salem, Ohio, 378 F.3d 566, 568 (6th Cir. 2004); Soneeya v. Spencer, 851 F. Supp. 2d 228, 244 (D. Mass. 2012).

61 For example, Dean Spade, "Resisting Medicine, Re/modeling Gender," *Berkeley Women's Law Journal* 18 (2003): 15–37.

62 See Ben-Asher, "Necessity of Sex Change."

63 Judith Butler, *Undoing Gender* (New York: Routledge, 2004) ("Until those social conditions are radically changed, freedom will require unfreedom, and autonomy is implicated in subjection").

64 Ben-Asher, "Necessity of Sex Change."

65 Ibid. Instead, it is "a relatively common anatomical variation from the 'standard' male and female types; just as skin and hair color vary along a wide spectrum, so does sexual and reproductive anatomy." This idea that intersexuality is a variation and not a medical condition was (and still is) important to many individuals with intersex and medical allies for two main reasons. First, strategically, if the goal of ending early surgeries on infants was to be achieved, the medical community and the public would have to understand that early intersex surgery is not medically necessary, but that it is

cosmetic, elective, and experimental. Second, the reported experience of individuals with intersex (including those who were spared surgery when their parents opposed medical convention) has centered on social oppression of their nonconforming bodies, and not on social treatment of a real medical issue.

66 The first lawsuit in the United States, *M.C. v. Aaronson*, was filed in 2013 in a federal court in South Carolina. The Complaint relies on the classification of Disorders of Sex Development (DSD). It was eventually dismissed. Complaint, M.C. v. Aaronson, No. 13-1303 (D.S.C. May 14, 2013), 2013 WL 1961775.

67 Ibid.

68 Riki Anne Wilchins, *Read My Lips: Sexual Subversion and the End of Gender* (Riverdale, NY: Firebrand Books, 1997).

69 M.C. *ex rel.* Crawford v. Amrhein, 598 F. App'x 143 (4th Cir. 2015).

70 For example, *Gender Revolution*, produced by National Geographic, Katie Couric, and World of Wonder, performed by Katie Couric, February 6, 2017.

71 For example, *Transparent*, produced by Jill Soloway, Andrea Sperling, and Victor Hsu (Amazon Studios, February 6, 2014).

72 For example, "Gender Identity Is in the Brain. What Does This Tell Us?" *Psychology Today*, Aug. 10, 2016, https://www.psychologytoday.com/us/blog/hormones-and-the-brain/201608/gender-identity-is-in-the-brain-what-does-tell-us, accessed October 14, 2018.

73 For earlier work that has greatly influenced my thinking about queer legal theory, see Wendy Brown and Janet E. Halley, *Left Legalism/Left Critique* (Durham, NC: Duke University Press, 2002); Katherine M. Franke, "What's Wrong with Sexual Harassment?" *Stanford Law Review* 49, no. 4 (1997): 691–772, https://doi.org/10.2307/1229336; Katherine M. Franke, "Theorizing Yes: An Essay on Feminism, Law, and Desire," *Columbia Law Review* 101 (2001): 181–208.

74 Foucault, *History of Sexuality*.

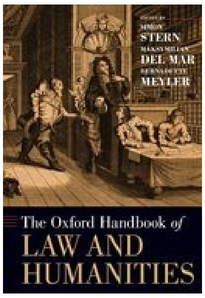
75 For example, Duncan Kennedy, *A Critique of Adjudication: Fin de Siècle* (Cambridge, MA: Harvard University Press, 1998); Brown, *Left Legalism*.

76 See Avital Ronell, *The Test Drive* (Urbana: University of Illinois Press, 2008); Bernard Arthur Owen Williams and Josefine Nauckhoff, *Nietzsche: The Gay Science* (Cambridge: Cambridge University Press, 2001).

77 For example, Michael Boucai, "Glorious Precedents: When Gay Marriage Was Radical," *Yale Journal of Law & the Humanities* 27 (2015): 1–82.

78 Janet E. Halley, "Romer v. Hardwick," *University of Colorado Law Review* 68 (1997): 429–452.

79 For instance, my early work explored the emergence of transgender identities in law, emphasizing the limits of arguments for equality and the paradoxical reliance on medical authority for the legal rights of intersex and transgender people. Ben-Asher, "Paradoxes." My later work on "dignity" in the marriage-equality cases in the Supreme Court (Obergefell, Windsor), unpacks the deep shame embodied in these cases (the shame of singlehood, the shame of public sex, the shame of non-monogamy, etc.).



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CHAPTER

34 The Functions of Legal Literature and Case Reporting Before and After *Stare Decisis*

Andrew Benjamin Bricker

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Abstract

This chapter documents some of the diverse functions of legal literature and case reporting prior to the emergence of the modern doctrine of *stare decisis* in the mid-nineteenth century. In examining the historical variability of legal literature, this chapter attempts to open up new avenues of research for scholars working between law and the humanities. By acknowledging and trying to make sense of that diversity, scholars might find in legal literature useful archival objects that could serve as evidence for phenomena beyond the recording of decisions and the transmission of precedents. This chapter briefly tracks the shifting functions of legal literature in late-medieval and early modern England to suggest how scholars might use such sources. The remainder of the chapter focuses on a transitional period in the history of *stare decisis*: the eighteenth and nineteenth centuries, when legal practitioners began fully to grapple with a much more modern notion of precedent as fully binding. Even during this period, however, case reporting served a variety of ends beyond the transmission of precedent, and social historians and literary scholars in particular have used legal literature in creative ways to track both societal shifts and literary forms. The goal here is to expand how scholars working at the intersections of law and the humanities might use legal literature and to suggest new ways to think about case reports: not solely as narrow objects for the transmission of precedent but as archival resources for a variety of superficially non-legal subjects.

Keywords: precedent, case reporting, legal literature, stare decisis, popular literature, law and literature

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34.1 Case Reporting: Functions and Forms

WE might start in the most obvious place: What is a case report? Or, more accurately, what have case reports been historically: who produced them, what did they contain, how have they changed over time, how were they circulated, and, perhaps most important, what were they supposed to do? For legal practitioners today, a case report is a uniform object, centrally reported with a clear documentary end in the service of *stare decisis*. As the Incorporated Council of Law Reporting (ICLR) for England and Wales observes, “A law report is a record of a judicial decision on a point of law which sets a precedent.”[1]

However, such a presentist conception of case reporting occludes the historical variability of legal literature, both in the shapes it has taken, whether in manuscript, print, or digital media, and in the functions it has performed, whether at law or among lay readers. The ICLR’s version of case reporting is actually a recent object within the history of the common law, one that only emerges alongside normative legal reform in ↳ p. 620 the mid-nineteenth century in the Anglo-American legal tradition. Prior to the mid-nineteenth century, case reports were often privately published by individuals with sometimes only tenuous ties to the law. In addition, legal literature took a variety of forms and, perhaps to the surprise of those largely familiar with standardized case reports, such as the later *English Reports*, served a variety of purposes beyond solely the transmission of judicial opinions. Even in the thirteenth century, for instance, justices were using individual decisions recorded in the plea rolls in a highly instrumental manner. As Thomas McSweeney has shown, such justices were more interested in “how they could work individual cases into a harmonious system” of law modeled after the work of scholars of civil and canon law than in recording precedents in the service of later cases.[2] Medieval yearbooks likewise rarely transmitted precedents. Such yearbooks, seemingly compiled by legal apprentices, instead functioned as educational resources for legal novices and focus primarily on the pleading of the lawyers and the arguments they presented in court. As Peter M. Tiersma has observed, “in many of these early reports the actual decision—if reported at all—was almost an afterthought.”[3]

Moreover, only after the modern doctrine of *stare decisis* had fully taken root in the nineteenth century could case reports themselves serve a uniform function. Decisions in medieval and early modern cases had always guided judicial opinions, at least as a rough account of what the law was, but no judge or legal practitioner felt wholly compelled to defer to earlier rulings. Our very notion of “precedent” as a *fully* binding judicial decision on a point of law is, in fact, a recent legal construction.[4] Nonetheless, starting in the late fifteenth century, judges began to describe their decisions as precedents, arguing especially during the early modern period that earlier rulings should be employed in later judicial decisions.[5] As Ian Williams has shown, by the mid-seventeenth century both lawyers and judges had come to share “a notion of the binding force of previous cases,” though this notion was not undergirded by a fully developed doctrine. In addition, this emerging judicial notion of precedent differed radically from the more literalist philosophy of *stare decisis* that only emerged later. As Williams observes, during this period “we can see an occasional, but powerful, practice of precedent, albeit a practice without clear rules or much of an underlying theory.”[6] As Gerald Postema has shown, only in the eighteenth century does a modern philosophy of precedent start to emerge, when judges begin to view earlier rulings as binding.[7] Moreover, ↳ p. 621 haphazard case reporting and sometimes unreliable printed accounts of specific legal branches meant that case law itself could be dubious. Most legal practitioners during the medieval and early modern periods learned the law by sitting in on cases, which they supplemented with manuscript reports and, later, published accounts.[8]

Even today, case reports tend to be intentionally selective. As Nathaniel Lindley argued in his proposal submitted to parliament in 1863 for the founding of the ICLR, case reporters were expected to omit cases that passed without discussion or largely reiterated or confirmed earlier precedents.[9] Today, even the most capacious reports fail to “reflect the intricacies of a dispute, the nuances of the lawyer’s strategies in court and the general realities of litigation.”[10] One need only look to the media through which case reports have been and are currently disseminated. The circulation of case reports is important, because their material packaging—or even immateriality, as cases simply remembered by medieval and early modern justices and lawyers—has been a fundamental condition of both their accessibility and survival.[11] Manuscript collections of case reports, for instance, were often shared solely within the clubbish world of the Inns of Court. Moreover, the necessity of producing further copies by hand meant that the contents of manuscript collections sometimes varied wildly and reached a far smaller audience than later printed reports, which were in turn much more widely circulated but also sometimes unreliable, as many in the legal profession routinely complained. The result was that most legal practitioners were forced into a piecemeal approach to research: recollections of oral in-court pleading and debate; snippets of manuscripts glanced upon or thankfully copied; privately printed case reports carefully vetted for their applicability and validity. Even sitting justices found themselves grappling with the materiality of case reports. As Paul Halliday has shown, in the eighteenth century sitting justices relied heavily on the court clerks, who produced manuscript precedent books derived from additional archival sources, over both of which the clerks remained sole masters.[12]

Today we are still grappling with the materiality of legal archives and the implications of digitization. The *English Reports* have been, for nearly a century, the central printed archive for legal-historical research, but the cases they contain were often radically altered by their editors, who emended, glossed, and adumbrated the original archival sources. As Ayelet Ben-Yishai has argued, this careful process of re-presentation, and even, in part, distortion in the service of *stare decisis*, was already under way in the nineteenth century. Case p. 622 reports then sought to balance the concrete and messy reality ↳ of a trial with the reporters' desire for an abstract rule derived from the judge's opinion. The result, Ben-Yishai concludes, is the "antinarrativity" of more recent case reports:

> law reports use narrative conventions, often in counterintuitive ways, to prompt recognition that their truth claims are limited to potential precedent and not to a referential truth. The lack of specificity and the striking dearth of adjectives, adverbs, or modifiers that characterize many law reports render the story they tell generic to the point of abstraction. They no longer present the specific facts of a case, but rather offer a shell or skeleton to which other sets of specific facts can be compared. Most importantly, this unwieldy form also enables the communal nature and goal of precedential reasoning: namely, imagining a yet-unknown future through the authority of the past, actualizing a common law dating from time immemorial, and bringing the past into the present for the sake of a future.[13]

Today we continue to grapple with the material transmission of the law. As Tiersma has argued, databases have tended to reduce the "conceptual" nature of legal precedents.[14] In an era of digitization, our primary means of accessing judicial opinions and case reports is through keyword searches in such databases as HeinOnline. The result, Tiersma argues, is that the common law is not only less "conceptual" and more "textual" but also less malleable: the common law, that is, "may lose the flexibility it once had to be interpreted and reinterpreted to fit new and unforeseen situations."[15] The reduced interpretative malleability of judicial opinions, once delivered orally in court and captured by recorders, is particularly problematic at English common law, where judgments continue to retain residues of orality, even when judges actively employ a form of legal discourse symptomatic of written language.[16]

All of this suggests that we need think about legal literature in a more piecemeal fashion. Perhaps most importantly, we ought to inquire into the implicit and changing functions of case reporting over time. My overarching goal in this chapter is to do precisely that and, in the process, suggest how the historical variability of case reporting opens up new avenues for interdisciplinary research between law and the humanities. By acknowledging and trying to make sense of that diversity, scholars might come to use case reports as archival objects that serve as evidence for a range of phenomena beyond the recording of

p. 623 decisions in the service of *stare decisis*. To track the shifting functions of legal literature, the remainder of this chapter is broken into two sections. In the next section I offer ↳ a brief overview of late-medieval and early modern legal literature in England, outlining some of the diverse functions of legal literature, before the emergence of *stare decisis*, to suggest some possible uses of case reports for scholars interested in connections between law and the humanities. In my final section I turn to a critical transitional period in the history of *stare decisis*: the eighteenth and nineteenth centuries, when legal practitioners began fully to grapple with a much more modern notion of precedent as fully binding, showing how, even during this period, popular case reports functioned as salacious forms of popular and often erotic literature. I also point briefly to the functions of case reporting following the founding of the ICLR in 1865, by which time judges had come to accept the modern doctrine of *stare decisis*. Since then, case reports have served a very precise function and have assumed a largely standardized form. Nonetheless, scholars working at the intersections of law and the humanities have found and might continue to find diverse secondary uses for these documents beyond the transmission of precedent. Ultimately, I hope to expand how scholars working on law and the humanities think about and use legal literature and to suggest how we might conceptualize case reports: not as narrow objects for the transmission of precedent but as rich archival resources for a variety of non-legal phenomena.

34.2 The Functions of Medieval and Early Modern Legal Literature

In this section I describe briefly the evolution of legal literature during the medieval and early modern periods, especially before the standardization of case reporting in the nineteenth century. I focus in particular on the functional variability of legal literature, drawing attention to the variety of ends it served during these periods. In so doing, I suggest some ways scholars working between law and the humanities have employed and might continue to use medieval and early modern legal literature—not as uniform objects for the transmission of precedents but as polyvalent documents in legal history and at the intersections of law and culture.

In 1865 the ICLR was founded, becoming the lone authorized publisher of official case reports for the superior and appellate courts of England and Wales. The case reports produced by the ICLR in the last half of the nineteenth century look much like our own today: they usually contain the facts of the case, the arguments presented in court, and the reasoning and verdict of the judge.[17] The advent of the ICLR was in large measure a corrective to two problems in legal reporting that had taken centuries at common law to emerge and crystallize. The first issue was the supposed unreliability of case reports in the absence of a
p. 624 central reporting body. Even more important, however, was a second ↳ factor: a radical change in the philosophy of jurisprudence itself. Prior to the latter half of the nineteenth century, no sitting justice wholly subscribed to the modern doctrine of *stare decisis*.[18] Throughout the late medieval and early modern periods, judges instead employed a “canonist” approach to case law. Judicial decisions, justices argued, “could be used to illustrate legal principles, but were not themselves an authoritative source of law.”[19] Earlier legal rulings were important and useful, every justice agreed, but they were not the law. As judge after judge observed, “judges did not make law. Their opinions were not sources of law, but simply evidence as to what the law was commonly held to be. Nor were they exclusive evidence.”[20]

The notion of *stare decisis* itself first emerged in the late seventeenth century. But for centuries it was not, as John Baker has put it, “an absolute fetter on the courts.”[21] As a result, for most early modern justices previous rulings were provisional. As Michael Lobban writes, “precedents were not absolute, nor did they create precise rules. […] Every case was in effect a new deliberation of circumstances, to be guided but not bound by past analogies.”[22] In practice this meant that judges had immense discretion, sometimes setting aside earlier rulings as simply unreasonable, disanalogous, or even inconvenient.[23] Only in the nineteenth century did justices come to accept the modern notion that pertinent earlier rulings were *fully* binding. As a result, centralized case reporting only became wholly indispensable following a widespread and radical shift in judicial philosophy; reliable legal reporting only emerged at the moment when case reports became the fundamental precedential wellspring for later judicial opinions.

As a result, medieval and early modern legal literature tended to serve a variety of functions beyond the transmission of earlier rulings. This legal literature is worth the attention of scholars working at the intersections of law and the humanities because so much of the earliest legal literature, which came to influence early modern legal practice and theory, and thus our own common-law inheritance, served some ideological purpose. For instance, rather than being objective, disinterested transcripts produced simply to document decisions and legal reasoning, medieval legal literature attempted to shape thinking about the law, the thinking of jurists, and the normative relationship between law and society. Take the *Leges Edwardi Confessoris* (*The Laws of Edward the Confessor*) (*c.* 1150), one of the earliest known Anglo-Norman legal treatises, which exhibits marked anti-Norman and especially anti-Danish sentiment in its advocacy for p. 625 West Saxon institutions and the Church. Most problematically, the *Leges Edwardi* ↳ *Confessoris* circulated widely in manuscript and was routinely cited by late-medieval and early modern jurists, including Sir Edward Coke.[24] But the document is seemingly nothing more than pseudo-history and conjecture, a dubious account of thirty-nine laws in existence during the reign of King Edward the Confessor (1042–1066) derived from a meeting among twelve noblemen from different shires in 1070—an event that seemingly never took place, recording "laws" that had perhaps never existed.[25] That this early piece of legal literature shaped later judicial opinions and legal practice is important. But even more important, perhaps, is the normative role it played in shaping the relationship between law and society.[26]

The afterlife of the *Leges Edwardi Confessoris* also draws attention to the ideological function of legal reporting: a notion of neutrality, central today to its seemingly disembodied, ostensibly disinterested transmission, hardly existed.[27] This ideological function is clearest in the way medieval and early modern jurists and legal commentators implicitly and sometimes openly rejected anything approaching the much more modern doctrine of *stare decisis*. Take, for instance, *De Legibus et Consuetudinibus Angliæ* (often translated as *Bracton on the Laws and Customs of England*).[28] Even this massively influential treatise was more intently focused on reproducing forms of judicial behavior, decorum and reasoning than in documenting serviceable records of legal opinions. That *Bracton* became a standard work of legal reference was an accident of its form rather than its argumentative intent: *Bracton* effectively taught thirteenth- and fourteenth-century lawyers *how* to read case law, but its objective was to undermine the modern tendencies of contemporary judges by documenting the behavior of justices some twenty years prior. The goal of *Bracton* was thus not descriptive but normative. Moreover, like the *Leges Henrici Primi*, produced a century and half earlier, *Bracton* draws promiscuously from decidedly non-common-law sources. In particular, it makes extensive use of Roman law to discuss certain issues in the absence of English examples—a privileging of sources fully approved by later justices, including Coke and Sir John Holt.[29] The point is that *Bracton* is less focused on transmitting English case law than in producing ideal forms of legal behavior.[30] As *Bracton* puts it, "*Item communis intentio est de iure scribere ut rudes efficiantur subtiles, subtiles subtiliores, et* p. 626 *homines mali efficiantur boni et boni meliores*" ↳ [The general intention is to treat of law that the unskilled may be made expert, the expert more expert, the bad good and the good better].[31]

Some of our earliest accounts of the law come from medieval plea rolls. Starting in roughly the 1220s, lawyers began to extract cases from these rolls, especially those that seemingly illustrated the law. Nonetheless, for centuries thereafter, there was little in the way of a formally reported body of cases. Instead, most judges and lawyers had to rely on cobbled-together manuscript notes and their memories of so-called forensic exchanges in court.[32] Both lawyers and judges knew that records needed to be kept to aid memory, but what, precisely, those records were so supposed to contain and what they were supposed to do was less clear. For instance, beginning in the 1250s we start to see arguments and remarks attributed to named judges in the pleas rolls. But the function of such remarks varied widely: some were collections of dicta; others merely illustrated procedure. Starting in the 1280s, these reports began to document particular eyre sessions or terms at Westminster and assumed the format that came to dominate court reporting for centuries. These were “reports” later known as yearbooks—so called, because they were annually compiled between 1268 and 1535.[33] Even still, it would be difficult to reduce such yearbooks down to precedential documents.[34] They were not, that is, used primarily to communicate judicial opinions but functioned primarily as educational resources for new lawyers, which were more concerned with documenting process and pleading than with recording the decisions the justices ultimately produced.[35] As Baker has argued, their purpose was to “record the intellectual aspect of litigation: to circulate and preserve for future learning, both by students and by their practicing elders, the possible moves in the recondite games of legal chess played by the pleaders in open court.”[36]

Moreover, if the primary function of late-medieval yearbooks was not the replication and dissemination of legal precedents but instead the simulation or modeling of a kind of legal game theory—how one approached the arguing of a case—then we might look for links between early law reporting and the practice of rhetoric. Books on rhetoric simply flourished during the late-medieval and early modern periods.[37] This seeming overlap between legal language and rhetorical practice thus points to new avenues for interdisciplinary research: the legal profession and legal literature were not siloed off from one another p. 627 or from larger cultural debates around the efficacy of certain kinds of ↳ language, as scholars such as Peter Goodrich have amply demonstrated.[38] Moreover, working from the yearbooks, one might suggest the distinct ways in which legal practitioners and rhetoricians participated in, produced, or shaped a larger cultural preoccupation with language itself during these periods. One way to approach case law, then, is historically. Doing so might give us a different functional sense of early legal literature—that is, how case reporting differed over time, in large measure as a product of the perceived use of trial reports themselves. Another way to put this is that, based on what we believe case reports were supposed to do at a certain time, we can suggest how they both shaped and were shaped by the larger cultural spheres in which they moved.

Even still, any account of the yearbooks as educational resources with possibly intimate ties to the discipline of rhetoric has the tendency to reduce their variability, from year to year, their radical differences over time, and their sometimes ambiguous functions. In the first place, the yearbooks eventually grew longer and longer. Yet hardly did this volubility translate into readily discernible models for different aspects of legal practice and education. The yearbooks often contain long and, from a purely doctrinal perspective, legally extraneous conversations and details from individual cases; some, in fact, seem more concerned with the idiosyncrasies and personalities of the justices than the nitty-gritty workings of the courts.

At first glance, it is often hard to discern what functions these aspects of the yearbooks served. For legal historians preoccupied with doctrine, the yearbooks offer at best a frustratingly opaque glimpse into the history of the law.[39] But for scholars interested in the intersections between law and the humanities, the yearbooks offer an annual anthology of potential horizons. As biographical objects, for instance, the yearbooks might be an early forerunner for the emerging conventions of English life writing. It is worth keeping in mind that the yearbooks were first produced in the mid- to late thirteenth century—almost two hundred years before *The Book of Margery Kempe*, the first autobiography in English. Forms of life writing of course preceded the yearbooks (Augustine’s *Confessions*, for instance, dates from the fourth century), but one might take these legal texts as some of the earliest instantiations of biographical sketching in England, works that both drew on extant models and perhaps produced new ways of thinking about biography. Perhaps to the shock of modern-day readers, as late as the fifteenth century the yearbooks contain literal “supper-table discussion” among judges and serjeants, who lodged together during this period.[40] The point is that yearbooks were neither uniform over time nor fundamentally always in the service of legal ends, let alone the precise and anachronistic task of transmitting precedents. Moreover, it should be clear that yearbooks were hardly unvarying legal reports that sought to document judicial opinions and the logic behind them for the use of later legal practitioners.

p. 628 Over the course of the sixteenth century, the yearbooks were eventually displaced. Two factors were central to this shift in legal literature.[41] The first was the introduction of printing to England in the 1470s. Within a decade, London printers had begun to supply the legal profession with printed works. By the mid-1550s, the entire canon of yearbooks had been printed, before being edited into eight volumes between 1590 and 1610. But even these early modern volumes were riddled with defects: sometimes cases were omitted; at other times an individual trial reported by different hands could be presented as related but different cases. For all of their defects, however, printed legal literature helped to change case reporting itself; it provided both a newly standardized method of citation and a seemingly authoritative set of case reports. The second major factor in the displacement of the yearbooks was the growing personalization of law reporting. During the sixteenth century legal practitioners increasingly came to distinguish the reports of individual reporters, producing the so-called nominate reports.[42] The name attached to each report, that of a distinguished lawyer or famous judge, was sometimes only a fiction of corporate authorship, a link to someone who perhaps had little or no connection to the actual reports.[43] Nonetheless, nominate reports served an important intermediary role between the yearbooks and the normative legal reforms of the nineteenth century: “the Nominate Reports […] introduced the style and approach which has become characteristic of modern law reporting.”[44]

The point to all of this is that medieval and early modern legal literature, despite failing to serve a narrow doctrinal purpose—the transmission of precedent—can be and should be a useful archival resource for ostensibly non-legal subjects, such as life writing, and such interdisciplinary topics as the intersections between law and society and law and rhetoric. To think of early works of legal literature only as possible sources for the origins of specific doctrines is to miss their original and variable functions and to ignore, perhaps, some of their most interesting and useful features.

34.3 Trials as Popular Literature: Case Reporting in Eighteenth- and Nineteenth-Century England

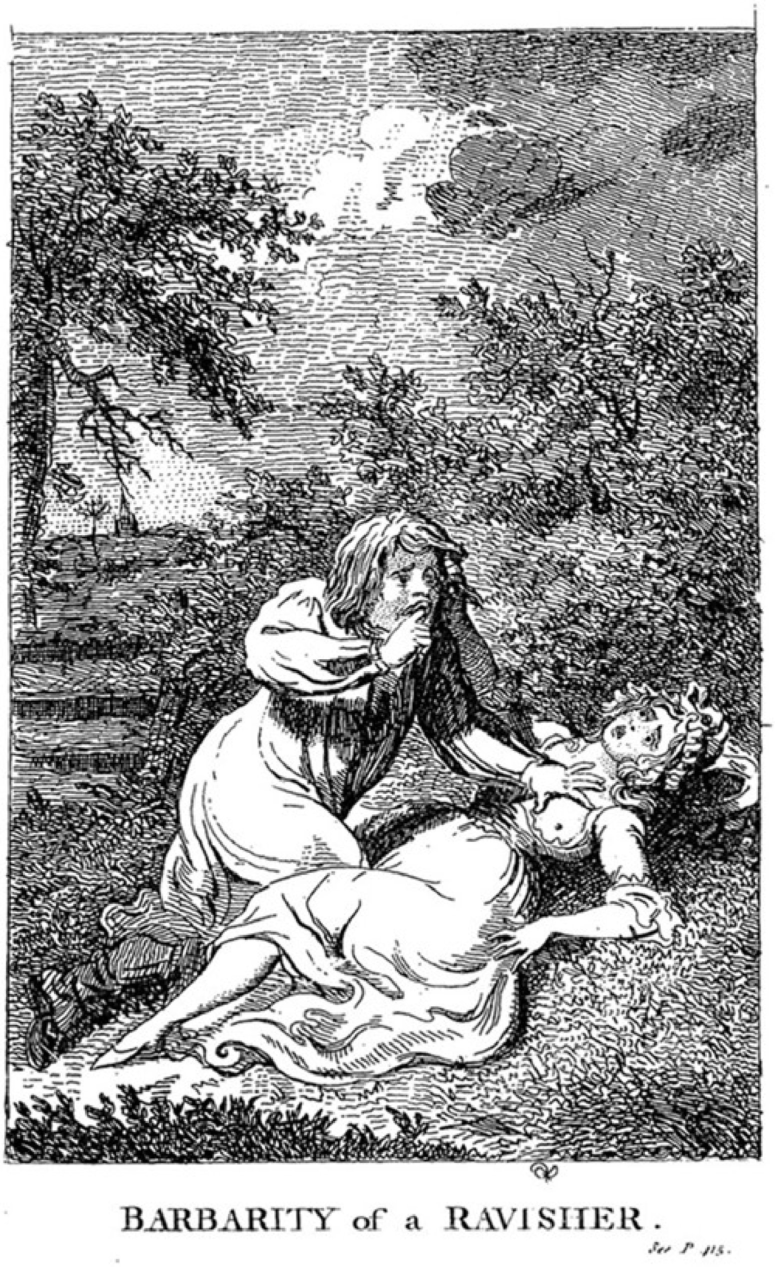
Throughout the eighteenth century, lawyers, justices, and legal commentators regularly complained about the supposedly impoverished state of case reporting. As Chief Justice Sir John Holt groused at the beginning of the century, the “scrambling reports” from which judges and barristers worked “will make us appear to p. 629 posterity for a parcel of ↳ blockheads.”[45] Sometimes cases, even important cases, went wholly undocumented or fell victim to precarious, selective, or instrumental reporting.[46] Some reporters, moreover, were frankly unreliable—so unreliable, in fact, that Chief Justice Lord Mansfield instructed barristers not to cite them.[47] The discrepancies and inconsistencies of case reporting plagued judicial life. As the legal historian C. H. S. Fifoot put it, prior to Burrow’s law reports (1766–1780), legal reporters enjoyed “an obliging reputation for incoherence and ineptitude.”[48] As a result, justices and lawyers alike used manuscript notes to supplement printed reports. In some instances, justices even privileged manuscript reports over printed reports, when they could be used to “facilitate a more palatable or different interpretation.”[49] Unsurprisingly, throughout the eighteenth and nineteenth centuries, lawyer after lawyer and writer after writer—and perhaps most vociferously and famously Jeremy Bentham—advocated for a centralized and authoritative system of legal recordkeeping.[50]

For all of the complaining of judges and legal commentators alike, however, law reporting had grown both more uniform and more reliable by the eighteenth century. Trial reports from this period routinely contain the same types of information: the facts of the case, the central legal issue, the testimony of victims and witnesses, the wrangling of the lawyers, the decision of the judge and, when the defendant lost, the sentence or amount of damages. Though useful for illustrating legal practices over time, such case reports were nonetheless hardly binding precedential documents. Sometimes they served little purpose at law and particularly in the recounting and establishment of precedent. For instance, many printed case reports from this period only document the most sensational and salacious trials—courtroom dramas full of murder, infanticide, rape, and adultery—with no eye whatsoever to precedent. In this section I examine two such examples, both of which testify to two recurring themes in this chapter. First, that popularly printed case reports often served no precedential purpose; and, second, that popular case reports, especially from the eighteenth and nineteenth centuries, have been immensely useful to social historians, literary scholars, and others as resources in the history and theorization of nominally non-legal topics.

Trials for adultery were perhaps the most infamous kind of popular legal reporting during this period. Prior to the Matrimonial Causes Act (1857), divorces were granted by private act of parliament.[51] To obtain such an act, husbands and wives were usually required to obtain a divorce *a mensa et thoro* from an ecclesiastical court for either ↳ adultery or cruelty. Then, and even more sensationally, the aggrieved husband was obliged to obtain a "verdict at law" by successfully suing the adulterer for damages in court for "criminal conversation." Case reports for "Crim. Con." trials, as they were known, were bestsellers in the eighteenth-century book market and were filled with predictably lurid details—miniature courtroom dramas in adversarial dialogue seemingly intended, as Rousseau would later describe novels, to be read with one hand.

Like Crim. Con. trials, case reports for criminal trials for rape also proved immensely popular, with their intimate first-hand testimony, wildly obscene details, and shockingly invasive cross-examinations.[52] Peter Wagner has gone so far as to call case reports for adultery, rape, and "sexual perversion [...] a most peculiar genre of eighteenth-century English erotica."[53] Particularly lurid trial transcripts were repackaged and reprinted throughout the century as titillating real-life tales of sexual depravity. The long-winded titles of such works make as much clear. Think only of *The Bloody Register: A Select and Judicious Collection of the Most Remarkable Trials, for Murder, Treason, Rape, Sodomy, Highway Roberry, Pyracy, House-Breaking, Perjury, Forgery, and Other High Crimes and Misdemeanors* (1764). On their surface, these case reports provided superficial warnings, ostensibly cautioning readers against the dangers of falling on the wrong side of lust or the law. But few booksellers were truly in the business of policing public morals; such trial reports were instead the most sexually explicit textual—and sometimes visual—objects in a culture that carefully monitored the spread of obscene and pornographic materials.[54] By the 1770s, trial reports were a booming cottage industry, especially case reports for sex crimes, which were collected in multivolume transcripts and sometimes rounded out with woodcuts that visualized the sexual event at the center of the case.[55] Take, for instance, the "Barbarity of a Ravisher" (Figure 34.1), a bizarrely erotic pastoral woodcut from *The Cuckold's Chronicle* (1793), a collection of "trials for adultery, incest, imbecillity, ravishment, &c.," illustrating the grisly rape of Isabella Blair by George Davidson, who was ultimately found guilty and hanged.[56]

Figure 34.1


BARBARITY of a RAVISHER.
See P 415.

“Barbarity of a Ravisher,” from *The Cuckold’s Chronicle: Being Select Trials for Adultery, Incest, Imbecillity, Ravishment*, &c., 2 vols. (London, 1793), 1.415.

One of the most famous prosecutions, widely reprinted throughout the century, was against Colonel Francis Charteris in 1729 for the rape of his servant, Ann Bond. In printed trial reports readers could find every p. 631 horrid detail of Bond’s harrowing testimony. After ↳

p. 632 ↳ hiring Bond, the Colonel, through a combination of threats and bribes, ordered her to sleep with him. Bond refused, however, until one day he managed to trap her alone: “as soon as she enter’d the Room, the Prisoner at the Bar bid her stir the Fire, and in the mean time he lock’d the Door, and suddenly catching her up in his Arms, forcibly threw her on a Couch […] when by the Violence which he then and there us’d, he had Carnal Knowledge of her.” What follows is an almost indecently minute examination of Bond’s account, including whether “he enter’d her body” and in what manner. Charteris “pull’d up her Clothes,” she answered. “Being ask’d, what follow’d thereupon? she stood silent; but the Question being repeated, she reply’d, *A great deal of wet*.” The details become worse and worse. Charteris tries to calm his victim but fails, “stop[ping] her Mouth with his Night-Cap” and lashing her “very severely” with a “Horse-Whip.” Later he claimed that she had robbed him, before ordering a male servant to kick her out of doors.[57]

By the time of his trial, Charteris was already infamous for sexually assaulting those in his employ. This, though, was hardly unusual, and the authorities were often more than happy to look the other way in a patriarchal culture that often excused aristocrats for violently preying on lower-class women and especially servants in their charge.[58] As a result, and despite the overwhelming evidence against him and his widespread reputation, many onlookers were shocked when he was found guilty and sentenced to death. Perhaps unsurprisingly, Charteris’s aristocratic friends were soon petitioning on his behalf; before long, the king pardoned him, a man cuttingly known as the “*Rape-Master-General* of Great-Britain” and so notoriously debauched that mother bawds during this era were colloquially known as “Charteris’s purveyors.”[59] The larger point worth observing is that rape and Crim. Con. trial reports served no legal function, and yet they have proven a tremendous documentary resource especially for scholars working on the history of sexuality, gender, femininity, and masculinity.[60]

Sex, of course, sold, but so did murder—especially murders committed by lovelorn women. Take, for instance, the case of Mary Blandy. By the summer of 1746, the unmarried Blandy was already in her late twenties, when Captain William Henry Cranstoun, the son of a Scottish lord, began to court her. Mary’s father, Francis, at first approved of the match, but attempted to break off the union when he discovered that Cranstoun already had a wife and child back in Scotland. Cranstoun protested the legality of his earlier p. 633 marriage, and Mary believed him. On Cranstoun’s urging, Mary began lacing her ↳ father’s tea with a so-called love powder, which turned out to be nothing more than arsenic.[61] Francis fell ill in August and died shortly thereafter.[62]

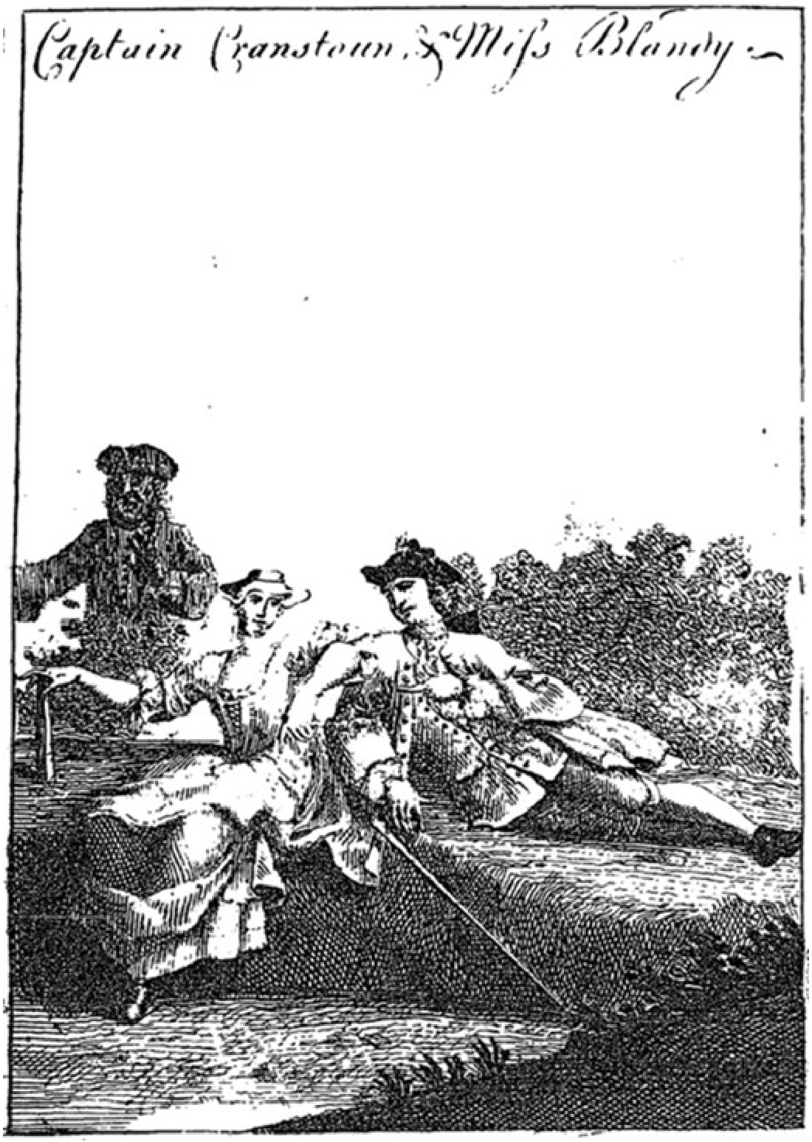
The Blandy affair was a largely open-and-shut case with little if not nothing to learn, at least from a legal perspective. The court’s decision in the case is not even recorded in the *English Reports*—and for obvious reasons: the Blandy trial and ruling simply confirmed the illegality of murder, a precedent with perhaps the greatest claim to belonging to time immemorial at common law. Nonetheless, the Blandy affair produced an extensive body of legal intertexts and paratexts, including some half-dozen published transcripts of the trial.[63] The story itself—and particularly the trial—simply fascinated mid-century readers.

Popular case reports were part of a larger and seemingly nonhierarchical web of nonfictional and fictional print objects that collectively examined and interrogated a salacious event. Rather than being the *terminus post quem* of a given case—the most reliable and definitive account of a trial—trial reports were only one object among many with varying levels of epistemological value. For instance, within a few years of Blandy’s trial, conviction and hanging, more than two dozen pamphlets had appeared, each carefully expanding on and supplementing the evidence presented at trial while sometimes even combatively squabbling with competing reports. So many of the legal paratexts produced around the trial carry an air of the *faux-semblant*. Take, for instance, *A Candid Appeal to the Publick*, an anonymous pamphlet that sought to dispel the “ridiculous and false Assertions” propagated by a widely republished piece entitled *Miss Mary Blandy’s Own Account of the Affair Between Her and Mr. Cranstoun*—an early example, perhaps, of the dizzying claims and counterclaims of “fake news” so familiar today.[64]

Trial transcripts became nothing more than one form of dubious documentary evidence. Soon other documents cramped the parricidal landscape: a private letter from a clergyman to the imprisoned murderess and her response; pseudo-biographical accounts of Blandy and her lover Cranstoun; even a mawkish narrativization of the entire grisly affair, rounded out by sentimental woodcuts (Figure 34.2) and a hodgepodge of perhaps fictional documents, including a “Poetical Epistle” supposedly penned by Blandy to her lover prior to her own execution, and a full-blown dramatic re-imagining entitled *The Female Parricide:*

A Tragedy (1761).[65] Blandy's case was simply the *cause célèbre* of 1752—a macabre yet maudlin modern p. 634 parable and real-life rewriting of George ↳ p. 635 ↳ Lillo's *The London Merchant* (1731), with a "poor lovesick girl" as its tragic hero.[66] As one onlooker wrote, in a letter sent to Blandy shortly after her conviction, "I dare say you have often wept at Distress in a Tragedy or Novel, where, perhaps, every thing was fictitious—much more may I at your too real Tragedy."[67] Perhaps shockingly, however, this sentimentalization—even fictionalization—of Blandy simply made her one celebrated murderer among so many in the eighteenth century, as trial transcripts became one more formal experiment in an era when criminal biography flourished as a major genre.[68] Think only of Elizabeth Jeffries, who along with her supposed lover contracted out a murder on her uncle to secure her inheritance and who later carried on a correspondence with Blandy herself.[69] Or take the case of James Hackman, the love-mad clergyman who murdered Martha Ray, the long-time mistress of the Earl of Sandwich, in front of the Covent Garden Theatre in spring of 1779, a story expertly retold by John Brewer.[70] Such case reports, moreover, were hardly down-market fodder. Many of the Blandy trial transcripts were produced by the most notable and respected publisher-booksellers in Great Britain and Ireland, including, in London, Andrew Millar, who "raised the price of literature," as Samuel Johnson remarked,[71] and Charles Rivington, who first published Richardson's *Pamela: Or, Virtue Rewarded* (1740); George Faulkner, perhaps the most important bookseller in Dublin, who served as Jonathan Swift's printer for two decades[72]; and James Magee, one of the most prolific booksellers in Belfast.[73]

Figure 34.2



Frontispiece from *The Genuine Lives of Capt. Cranstoun, and Miss Mary Blandy* (London, 1753).

Interestingly, despite serving no precedential end, popular trial reports helped to produce, almost by accident, the documentary standards that came to typify case reporting in the nineteenth century. The vulgar kitchen-sink realism of such case reports, we might even say, drew on the minute detailing of the emergent novel of the mid-eighteenth century with its dense particularity of place, time, character, and motive, a narrative method most famously articulated in Ian Watt's concept of "formal realism."[74] Moreover, this forensic detailing, this narrative desire to catalogue every seedy and salacious detail of a love-tinged murder trial or an adulterous affair and its humiliating public disclosure in a court of law, not only drew on the emergent conventions of realist fiction but also ↳ helped in turn to produce the exhaustive documentary standards of nineteenth-century case reporting, as Alexander Welsh and Jonathan H. Grossman have shown.[75] p. 636

In much of the research on trial reporting from the eighteenth and nineteenth centuries, scholars have pointed to a pronounced reciprocity between legal literature and literary method. Eleanor F. Shevlin, for instance, has documented the repurposing of trial transcripts in eighteenth-century novels, especially in cases and fictions preoccupied with property and its regulation.[76] In her study of case reports and appellate decisions in nineteenth-century America, Laura Hanft Korobkin has likewise shown the pervasive influence of sentimental fiction on the legal rhetoric employed in trials for criminal conversation, including the sometimes mawkish language, plots, and characterization of such novels in the courts' conceptualization of husbands' and wives' respective marital duties.[77] In a similar manner, Simon Stern has argued that judges' opinions structurally resemble detective stories. In both their "shared sense of inevitability in the whodunit and in the written opinion," Stern argues, "the judicial habit of slowly working up to a seemingly inexorable conclusion resembles the detective story's shrewd distribution of clues in such a way as to settle guilt on a culprit whose status similarly appears inevitable in retrospect."[78] Judicial decisions have simply been one of the most stable features of case reporting in the centuries both before and after normative legal reform. Opinions often employ what I have called elsewhere "judicial emplotment": in an almost archetypal act of formalized storytelling, judges in effect use precedents in an effort to justify both the court's ruling and the trial's ultimate legal outcome.[79]

Following the founding of the ICLR in 1865, case reports took on a consistent shape and a seemingly uniform function. The proposal submitted to parliament in 1863 by Nathaniel Lindley made perfectly clear what legal reports were supposed to do: cases were only worth recording when they introduced a new principle or a new rule; materially modified an existing principle or rule; settled a question upon which the law was doubtful; or were "peculiarly instructive."[80] As a result, unlike their forebears, case reports produced between the mid-nineteenth century and today have tended to serve a precisely defined purpose: the transmission of precedent in the service of *stare decisis*. Nonetheless, scholars working on this later p. 637 period have used case reports in a variety of ↳ non-precedential ways. The landmark copyright rulings of the later eighteenth century, for instance, have been especially helpful in reconstructing the emergence and shifting conceptions of commercial authorship and the history of reading.[81] Narratologists have likewise found the growth of testimonial evidence since the nineteenth century particularly illustrative in detailing the delicate interplay of narrative and the law within the adversarial system.[82]

These are only a few of the avenues of research scholars working at the intersections of law and the humanities have pursued and, in each instance, legal literature and case reports have proven immensely useful archival objects for a variety of nominally non-legal subjects. Simply put, prior to the mid-nineteenth century case reports were anything but uniform legal objects: they rarely contained the same kinds of content; they appeared in multiple media; and they often served very different objectives. Rather than being a problem, however, this diversity is perhaps the greatest virtue of legal literature and case reporting for scholars more concerned with the reciprocal relationship between legal history and culture at large than solely with transmission of precedent or the tracking of doctrine. Even after their standardization and normative legal reform in the mid-nineteenth century, case reports have continued to serve multiple functions. Scholars working at the intersections of law and the humanities should continue to find in them a wealth of starting points, analogues, and connections for their own research. By evaluating the functions of legal literature throughout the history of the common law, we might catch a glimpse of not merely how the courts and the legal profession worked but also how the law interacted with, shaped, and was shaped by the non-legal worlds in which legal literature moved.

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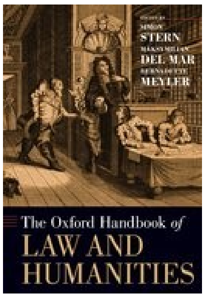

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CHAPTER

35 Trials and the Impressionism of Advocacy

Rex Ferguson

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Abstract

Trials have often been written about as narrative events: the standard claim being that at trial one narrative is pitted against another with the verdict proclaiming the winner. This is a connection which privileges a certain view of narrative that is defined by the coherence and closure produced by its plot and which is embodied, in literature, by realist fiction. While admitting the validity of this position, this chapter is intent upon extending it by examining the connection between trials and a different understanding and example of narrative fiction. Taking the Literary Impressionism of Joseph Conrad as a cue (and through an analysis of materials such as Scott Turow's *Presumed Innocent* (1987) and the 2014 podcast *Serial*) the chapter claims that narrative's capacity to contain non-sequential secrets, to convey latent messages, and to produce meaning from its seemingly peripheral constituents have, to date, been underanalyzed in the context of a narrative understanding of trials. In conclusion, the chapter argues that the impossibility of divorcing narrative from its instantiation in language has far-reaching consequences for how we might understand the narrative battle between prosecution and defense.

Keywords: trials, narrative, coherence, impressionism, story, plot, language, Joseph Conrad

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35.1 Introduction

DESPITE appearances, genres are resistant to rules. Take the example of detective fiction, which, in its golden age of the interwar years, was subject to at least two attempts to define, and hence limit, its bounds. S. S. van Dine's "Twenty Rules for Writing Detective Stories" appeared in 1928, swiftly followed the next year by Ronald Knox's "Decalogue." In both endeavors, the central rationale was the same: to produce a set of imperatives which would regulate the fairness with which the reader was treated. What was considered unconscionable in detective fiction was for the *denouement* to be either illogical or entirely resistant to accurate anticipation.

Yet what the history of detective fiction has demonstrated is a consistent flouting of these rules, even by authors whose writing is exemplary of the genre. Agatha Christie, the most famous and enduring writer of the "golden age," broke almost all of Knox's rules in the course of her career, yet she never stopped producing archetypal examples of the genre.[1] That this can be so is because, as Eliot A. Singer argues, genres are defined by expectations rather than norms. For Singer, "it is absolutely essential to the whodunit that there be an apparent crime (usually a murder), that someone seek to solve that crime, and that the reader not learn of the solution until the final epiphany. All other conventions, while presenting a certain aesthetic and insisting upon fairness to the reader, are merely expectations."[2] A similar account can be found in a recent ↳ dictionary definition of genre fiction, which describes it as "the kind of story that offers readers more or less what they would expect upon the basis of having read similar books before."[3]

If trials are to be thought of as one of law's genres, as the current section of this collection would prompt, it is therefore to the expectations about, and experience of, trials that attention should turn.[4] As such, while much could be said about trials as rule-bound processes governed by the laws of evidence, this chapter is more intent upon a line of inquiry devoted to how trials are expected to produce narratives, and what kind of expectations about narrative jurors might have. This brings me to the second reason for beginning with detective fiction: namely, that as a genre of fiction which (along with its close relatives the police procedural and the legal thriller) usually adheres to a realist framework, it exemplifies the connection that has commonly been made between trial and fictional narratives. As Singer asserts, novels of this type are characterized by the ultimate revelation of truth and guilt, with this being achieved, as Knox and van Dine's attempted rules suggest, in a manner which the reader can reflect upon as coherent, convincing, and explicable. Famously driven almost entirely by plot, the pleasure of the story thus relies on the way in which the conclusion is connected to the causal, sequential chains exhibited in a narrative retelling of the crime—precisely the kind of coherence that is fundamental to novelistic realism and which research has suggested is intrinsic to the judgments that jurors come to.

But the question this chapter asks is whether this is the only type of narrative fiction with which to think about narrative in trials. What, that is, if trials were also thought about as fora in which plot was eschewed in favor of some of the other things that narrative does? In taking the Literary Impressionism of Joseph Conrad as a cue, this chapter will suggest that narrative's capacity to contain non-sequential secrets, to convey latent messages and to produce meaning from its seemingly peripheral constituents have, to date, been underanalyzed in the context of a narrative understanding of trials. Taking this argument to its logical conclusion, it will be argued that the impossibility of divorcing narrative from its instantiation in language has far-reaching consequences for how we might understand the narrative battle between prosecution and defense.

35.2 Narrative Realism

That trials are narrative events of some order is an idea which has been developed, in legal studies, through a number of contexts. Taking an empirical approach, Lance Bennett and Martha Feldman proposed that the task of “reconstructing reality” which characterized a trial (especially criminal) was most plausibly made p. 641 through coherent ↳ story construction.[5] A similar idea was posited with the “story model” of Nancy Pennington and Reid Hastie who, through a series of experiments, tested the assumption that “meaning is assigned to trial evidence through the incorporation of that evidence into one or more plausible stories which describe ‘what happened’ during events testified to at the trial,” adding that “the level of acceptance will be determined by the coverage, coherence, and uniqueness of the ‘best’ story.”[6] With both sets of authors, the juror’s ultimate judgment depends upon the coherence lying at the very heart of the trial.[7] Thus Pennington and Hastie write of the trial’s story as “a hierarchy of embedded episodes” in which “the highest level episode characterizes the most important features of ‘what happened’ ” while Bennett and Feldman are concerned with the consistency and corroboration of the “central action” in the story, around which additional symbols may cohere.[8]

The reason that jurors do this, both models suggest, is because humans are hard-wired to think in narrative terms. Bennett and Feldman thus write that “we know implicitly how to connect relevant symbols in a story and how to systematize and interpret their bearing on the action that lies at the center of the story” with this point being asserted also by, among others, Jerome Bruner and Bernard S. Jackson.[9] While this implies a stridently essentialist view of the human relationship to narrative, most commentators have accepted that the position also includes a cultural dimension—and for some this has been paramount. The idea of law’s interaction with cultural narratives, often thought to have originated with Robert Cover’s influential line that “no set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning,” has thus motivated much of the most interesting work in “law and literature” over the past thirty years.[10] Among others, Kieran Dolin has taken this sense of “narrative” to include the fictional narratives of literature which are inherently expressive of the *nomos* (normative universe) which legal p. 642 civilizations are both located in and ↳ constitutive of.[11] And the task of examining the coherence between narratives advanced in prose fiction and in trials has been taken on by, among others, Alexander Welsh, Jan- Melissa Schramm, Lisa Rodensky, and Jonathan Grossman.[12]

This, too, in the context of studying contemporary popular culture, is the aim of Richard K. Sherwin, who argues that “familiar images, popular story forms, and recurring symbols […] are all grist for the lawyer’s storytelling mill” and records one seasoned litigator’s view that “I see what I do as playing into certain standard accepted stories that flow through society. What I do is take my client’s story and fit it into one of those narrative paths.”[13] The suggestion here is that jurors are more willing to go with a story which fits with the type they are used to reading, watching, or listening to. This point, in typically provocative and confrontational fashion, was taken to a logical extreme by the defense attorney Alan Dershowitz, some years ago. Dershowitz argues that jurors’ assumption of narrative principles (based on the same exposure to narrative models in fiction, film, and television that interest Sherwin) produces an unhelpful and prejudicial valorization of narrative coherence in the courtroom. Dershowitz paraphrases Chekhov’s famous statement that “if, in the first chapter you say that a gun hung on the wall, in the second or third chapter it must without fail be discharged” in order to illustrate how, in a criminal context, narrative conventions favor the prosecution because they are the ones who present a case.[14] In the absence of an alternative theory, which, even if available, has to pass strict evidentiary tests, the defense’s reliance simply upon the creation of doubt renders it vulnerable.[15] For this reason Dershowitz advocates for an evidentiary model derived not from narrative but from statistics and probabilities, though he concedes that “jurors, like most people, are not good at thinking statistically or probabilistically. They are much more comfortable thinking literarily, teleologically, religiously, narratively.”[16]

In pairing it with teleology, Dershowitz has a quite particular view of what narrative is—the same one as is evident from the period under consideration in the work by p. 643 ↳ Welsh, Schramm, Rodensky, and Grossman, which are all focused upon literature from the eighteenth and nineteenth centuries. Far from being a coincidence, this similitude is instructive of the way in which the connection between trial narrative and fictional narrative is made on the basis that narrative is synonymous with the literary realism that was dominant during that period. In other words, the conception of narrative which forms the bedrock of this strand of law and literature studies is a realist one. This works for a number of reasons. First, realism, which forms the basis of a large amount of genre fiction including detective fiction and the legal thriller, is premised upon the notion that language can, relatively accurately, reflect reality. Second, the reality which realism reflects is bound by commonsense notions of cause and effect which make for tightly woven plots in which characters' movements through linear models of time and space are charted, with those characters also exhibiting explicable motivation for their actions.[17] Finally, the narrative position of realism is that of the story's completion: a realist narrative tells of events which have already occurred and which can now be reflected upon and examined. In describing what he refers to as "the reconstructive trial." Lindsay Farmer makes similar claims for it, arguing that "the process was organized around the reconstruction of the event, through the presentation of direct and circumstantial evidence in specially designed courtrooms, and the testing of the reliability of testimony through cross-examination and debate."[18] This connection of forms through the genre of realism has been noted by many, including Ian Watt and Philip Weinstein, who writes that "like realist novels but more drastically, trials edit the messiness of life histories into the selective clarity of a developmental line. Both the protagonist of such novels and their readers engage in a jurylike trying out of materials encountered, sifting through appearance, zeroing in on the shape of the real."[19]

In realism, narrative is thus synonymous with coherence and closure, a very good literary example of this being a novel inspired by the trial process: *The Woman in White,*[20] which Wilkie Collins composed directly after attending the infamous trial of William Palmer in 1856. Rather than turning the particular facts of the Palmer case to novelistic use, it was the format of the trial, especially its rejection of hearsay, which inspired Collins. The opening page of *The Woman in White* thus reads:

> The story here presented will be told by more than one pen, as the story of an offence against the laws is told in Court by more than one witness—with the same object, in both cases, to present the truth always in its most direct and most intelligible aspect; p. 644 ↳ and to trace the course of one complete series of events, by making the persons who have been most closely connected with them, at each successive stage, relate their own experience, word for word.[21]

In the pages of Collins's novel characters lie and dissemble but narrators, as if on oath, tell the truth. What this adds up to, by the end of the novel, is a coherent whole: a complete narrative that solves the mystery, wraps up all the loose ends, and produces closure. At the center of this production is Walter Hartright, the character who has taken it upon himself to gather the many testimonies and lay them out in the specific order in which they are received by the reader: indeed, it is Hartright who pens the words quoted above. Within a logic inspired by the action of a trial, then, Hartright takes up the position of the prosecuting attorney. His task is to garner, collect, and present testimony as a coherent narrative which speaks guilt. And the success of his project is marked by the certainty with which the conclusions are met by the reader.

Narratological theory provides a language and a toolkit through which to think about such coherence. To evoke the terminology of the Russian Formalists, for instance, Collins's precise telling of *The Woman in White* is a *sjuzhet* (a particular discourse that exists in language) that is underpinned by a *fabula* (the actual story, made of units imagined as real events, which exists independently of the language that describes it). The narratologist Seymour Chatman thus indicates that it is *fabula* which is the object of narratological analysis when he writes that "words [...] are not the ultimate components of narratives; those ultimate elements are, rather, events and existents in a chain of temporal causality."[22] While a *sjuzhet* may or may not be linear and can contain numerous details that are extrinsic to the story, a *fabula* is chronologically ordered and is comprised only of its essential constituents. Extending this last premise from a structuralist position, Roland Barthes suggested that narratives were advanced through a set of nuclei (*noyaus*) or "cardinal functions" (intrinsic to the *fabula*) and a selection of complementary, peripheral catalysts (*catalyses*) which were only present in the *sjuzhet*.[23] In the Anglo-American context his idea was developed further by Seymour Chatman, using a vocabulary in which there were "kernels" that the story simply could not do without and "satellites" which merely added color and atmosphere to the basic story.[24]

Sound familiar? Both the "story model" of Pennington and Hastie and the "reconstruction of reality" proposed by Bennett and Feldman employ a similar thinking to that which posits a *fabula* comprised of "kernels" when making statements about the coherence of the "central action" or the "highest episode" of a trial narrative. And it could also be argued that the law of evidence, especially the test of relevance, is the p. 645 institutional mechanism which attempts to ensure that it is only "kernels" that a trial deals in. ↳ But this is also a logic of realist fiction in the sense that while all narrative has the *fabula*/*sjuzhet* strata, realism's greatest conceit is that its *sjuzhets* are emphatically made in the service of their *fabulas*. In other words, the precise discourse of the narrative chosen in realist fiction is *the* best way of getting to the really important thing—the story of what happened. The form of *The Woman in White* lays bare these inherent connections by employing a *sjuzhet* that openly mimics the functioning of a trial in order to represent the *fabula* that is its "central action."[25]

The fact that such an apt example of the connection between realist narrative and trial narrative that is formed by *The Woman in White* occurs during the high-water mark of literary realism—the mid-nineteenth century—is unsurprising. However, this is not to say that Victorian fiction is always aligned with the functioning of law. Schramm has argued that "time and time again in Victorian fiction we see the law ridiculed for its reductionism, for its legalese, for its callous failure to acknowledge that behind the language of rights, duties, and sanctions lies a seething world of emotional turmoil and physical experience which defies easy categorization or description."[26] The perusal of a dozen, randomly selected, pages of *Bleak House* would make this point abundantly clear.[27] Yet the target of Dickens's (and other Victorian writers') critique is often civil laws of contract, employment, or inheritance as opposed to the functioning of criminal trials, where the rationale behind the production of coherently connected narratives—what Alexander Welsh describes as "strong representations"—prevails.[28] It is also not to suggest that realism completely vanishes at the beginning of the twentieth century. What I do want to suggest, though, is that the experimentation that took place with the genre of realism from the beginning of the twentieth century onward has something to tell us about how trials really function in narrative terms.

35.3 Narrative Impressionism

A prime example of turn-of-the-century experimental narrative can be seen in the Literary Impressionism of Joseph Conrad. For Conrad, famously, his task as a writer was "by the power of the written word to make you hear, to make you feel—it is, before all, to make you see."[29] The assessment of this particular statement of Conrad's as emblematic of his aesthetic is partly attributable to its layers of ambiguity. In the context of p. 646 this ↳ chapter, the most significant of these surrounds the word "see." That this refers to the primacy of perception in Conrad's writing, and thus places him within a nascent modernism, is undoubtedly the case. But, equally important, it is indicative of Conrad's sense that narrative fiction should make its reader understand something—that is, "see" truth. Such a point would usually be interpreted to mean that the reader will, by the end of the book, have grasped something explicable and illuminating—and this would certainly be the case were a realist approach, or Dershowitz's "teleological" view, applied. But what if this command were taken less positively? What if to see truth was to apprehend not a logical philosophy or ethical position—much less a coherent narrative—but to perceive the frailty of those very things? Certainly, Conrad's narrative method as evidenced in his novels is assuredly not devoted to producing clarity. The unnamed narrator of *Heart of Darkness*, who reports the narrative related by Marlow, thus describes his style of storytelling in the following way:

> The yarns of seamen have a direct simplicity, the whole meaning of which lies within the shell of a cracked nut. But Marlow was not typical (if his propensity to spin yarns be excepted), and to him the meaning of an episode was not inside like a kernel but outside, enveloping the tale which brought it out only as a glow brings out a haze, in the likeness of one of these misty halos that sometimes are made visible by the spectral illumination of moonshine.[30]

Note, how the contrast between the storytelling of Marlow and other "seamen" maps on to the difference between *fabula* and *sjuzhet*. In their "yarns," other sailors are thus intent upon the "kernel" of a "cracked nut," the direct echo of Chatman's terminology being matched by the fact that, in this scene, Conrad is also making an implied critique of realism. With Marlow, by contrast, the value of storytelling is its capacity to "bring out a haze" in which listener and reader are enveloped in a "misty halo" of "spectral illumination." Unlike Pennington and Hastie's "story model" there is no hierarchy of "episodes" here, with even apparently minor ones being potential sites of such mood and atmosphere. The way in which Marlow (and Conrad) produces this effect is partly the result of rhetoric and stylistics: the writing is characterized by a dense prose, long descriptive passages, cloying syntax, and the constant use of extended metaphor. But it is also the narrative frame and its development which is intrinsic to the impression created. *Heart of Darkness* is thus constructed through a series of nested narratives beginning with the narrator's speech, which cedes to Marlow's, which ultimately reports Kurtz's—with this process then being reversed until the final lines are spoken by the narrator from his present-day location aboard ship, with Marlow, on the Thames. This structure creates an anticipation of the revelation that will occur when the center of the overall narrative is reached, but this is undermined by two things. First, Marlow's telling of his journey upriver consistently p. 647 retards the actual narration of getting anywhere through his continual ↳ digressions—this to the point at which stasis has been considered to be the novella's defining theme.[31] Second, the central point of the set of narratives—Kurtz's famous line "the horror! The horror!"—is so hopelessly obscure it appears designed to mock the very potential for singular interpretation. The heart, the kernel, of this narrative truly is a darkness.

This is not, however, to say that it is about nothing—a point that is brought out with admirable clarity in what is now a fairly old, but very good, interpretation of Conrad by Frank Kermode in his essay "Secrets and Narrative Sequence." Kermode, who focuses on *Under Western Eyes* (1911), begins his argument with a quote from that novel: "In the conduct of an invented story there are, no doubt, certain proprieties to be observed for the sake of clearness and effect."[32] The reason the narrator, who is only ever referred to as a "teacher of languages,” says this is to accentuate the fact that his own narrative is not “invented.” This point is emphasized throughout—“but this is not a work of imagination; I have no talent; my excuse for this undertaking lies not in its art but in its artlessness”—and is reminiscent of Bruner’s claim that lawyers “work hard to make their law stories as unstorylike as possible, even anti-storylike: factual, logically self-evident, hostile to the fanciful, respectful of the ordinary, seemingly ‘untailored.’ ”[33] One of the key “proprieties” which the teacher of languages refers to here is the production of clear narrative sequence. While this need not necessarily entail a straightforwardly chronological structure it does mean that a strong narrative is dependent on the causal chain it displays. *Under Western Eyes* has this and, as such, there is an underpinning of solid realism in the novel. But, for Kermode, this foundation is destabilized throughout because of the inclusion of non-narrative “secrets.” Running counter to the dominant logic of sequentiality, these secrets are hard to uncover partly because most readers willingly avoid them as “a passion for sequence” results in “the suppression of the secret.”[34] The majority of readers “underread” in this sense, yet at the same time most “authors are suspicious of overreaders, usually members of a special academic class that has the time to pry into secrets. Joyce said he had written a book to keep the professors busy; but James would not have said so, nor would Conrad, in whom the struggle between propriety and secrecy is especially intense.”[35]

What would such a struggle between propriety and secrecy look like if imagined in the context of a criminal trial? One good example comes from fiction and the depiction of the courtroom found in Scott Turow’s *Presumed Innocent* (1987), in which Assistant District Attorney Rusty Sabich is accused of murder and defended by the charismatic lawyer Sandy Stern. The case against Sabich is solid, and the prosecution is able p. 648 to establish a firmly connected, sequential, narrative—but it is Stern’s ability to undermine ↳ the power of sequence that wins the day. His tactics are first encountered early in the novel during a trial that Rusty, and the ultimate victim of the narrative, Carolyn Polhemus, try together, opposed to Stern. The case involves the physical abuse of a young boy by his mother, Colleen McGaffen, with there being little doubt that she is guilty. In the face of some damning evidence against his client, Stern puts McGaffen’s husband on the stand. Sabich summarizes as follows:

> A fine trial lawyer always has a latent message to the jury, too prejudicial or improper to speak aloud, whether it’s a racist appeal when black victims identify white defendants or the no-big-deal manner that a lawyer like Stern takes when the crime is only an attempt. In this case, Sandy wanted the jury to know that her husband forgave Colleen McGaffen, and if he could, why couldn’t they do that too?[36]

What Stern manages to do, here, is turn a satellite—a peripheral examination of a witness that has no apparently fundamental testimony to give—into *the* factor which will decide the case: McGaffen’s forgiveness by her husband is what will justify the jury’s forgiveness also, despite the fact that it has nothing to do with “what really happened.” In Sabich’s own trial, this theme of a latent message is exaggerated. First, through the fact that Sabich’s affair with Polhemus is not proven but is assumed and skirted around throughout. When Sabich’s boss and friend, Raymond Horgan, takes to the stand for the prosecution Stern recognizes that “it is a matter of tone, not so much as content” which makes his evidence important: as Rusty’s friend, if the prosecution can show that Horgan thinks Rusty is guilty then it enables the jury to reach the same conclusion with more ease.[37] Yet because Horgan also had a sexual relationship with Polhemus, Stern turns his cross-examination of him into an opportunity to transmit a latent message to the jury. As Sabich puts it:

> Sandy Stern has found the message to this jury that he wishes to send but never speak aloud. So what? He is saying. Suppose it is true that Sabich and the decedent had been intimate. Suppose that he chose, wisely or not, to keep that to himself. It is still no different from what Horgan did. If I was too embarrassed to confess aspects of my past conduct, everyone should understand. The knot

> between what I did not say and what I did had been untied; the juncture had been severed between murder and deceit.[38]

Even more melodramatically, Stern transmits a message about the proof of historical corruption which Polhemus was in possession of and which he wants to present. Stern knows that this information would incriminate the judge presiding over Sabich's trial and so, as soon as he can, Stern follows this move up by applying for a mistrial—which Judge Larren Lyttle takes. Lyttle is within his rights with this decision, but it p. 649 is borderline and it is strongly suggested that the trial would have continued had it not been for Stern's ↳ hints that he was in possession of the "B file." What Stern is dealing with here is, in every sense of the word, a secret—it is information that is not widely known which many want to keep under wraps and, in the context of the discussion in this chapter, it is a non-sequential element thrown into the mix of a sequential narrative which overrides its capacity to compel judgment.

Real life is unlikely to throw up quite such stark examples of secret messages as is evident in fictional narratives. Yet some of the most dramatic cases in recent years are notable for the way that they do. The infamous trial of O. J. Simpson, for example, saw Simpson's defense lead, Johnnie Cochran, enmesh the case into an atmosphere of decades-long institutional racism in such a way as to suggest that Simpson's acquittal would serve as a form of payback for all the undoubted wrongs endured by the African American community in Los Angeles.[39] So too, the 2014 trial of Oscar Pistorius, accused of murdering his girlfriend Reeva Steenkamp, was notable for the way in which Pistorius's defense that he fired shots through the locked bathroom door of his apartment because he feared an intruder rested upon the imagined, and never named, figure of the *swart gevaar* (black peril)—a figure of deep fear in white South African culture.[40]

Identifying the secret is thus often a case of seeing the transmission of messages based upon deep-seated prejudices that render judgment a matter of intuition. This is very much evident in the most recent mode through which trials have been made available to mass audiences: TV documentaries and podcasts. One of the most well-known examples of the former, the Netflix series *Making a Murderer*, thus offers a clear account of Steven Avery's arrest and conviction being based upon his outsider status.[41] But, here, I want to spend more time on an example of the latter: namely, the podcast *Serial*, co-produced and narrated by Sarah Koenig, which focuses upon the conviction of Adnan Syed in 1999 for the murder of his ex-girlfriend Hae Min Lee. As with *Making a Murderer*, the central conceit of *Serial* is that Syed's conviction was questionable and that the narrative one is listening to is serving as a retrial or appeal.[42] So, although *Serial* moves beyond the bounds of what would be allowed by evidentiary rules in a court of law—the proliferation of hearsay being a particular example—there is also a clear intention to mimic the principles of legal fact-finding and, as Julia Simon-Kerr suggests, place listeners "in the jury box" asking "them to decide what happened."[43] As in Truman Capote's landmark "non-fiction novel" *In Cold Blood* (1966), the inclusion of additional testimony and extrajudicial evidence is thus supposed to suggest that the podcast is providing the means for p. 650 a more accurate judgment. And, indeed, it is to the narrative of ↳ sequential causal chain that much of Koenig's attention turns, as she applies pressure to the coherence of the prosecution's case. Most notably, on this front, the very first episode suggests that Syed has an alibi for the time that Lee went missing while a recurring theme is the apparently hopeless inconsistency of the testimony given by the state's main witness, Syed's friend Jay, who claimed to have been shown Lee's deceased body by Syed and to have helped him to dispose of it. Testing this account at the logistical level of when and where, Koenig strongly presents the sense that Jay's, and hence the prosecution's, *sjuzhet* does not map on to an achievable, real-life, *fabula*.

Why, then, is Syed convicted? One answer to this is that a biased police force and jury were more willing to see guilt in a Muslim of Pakistani heritage than they should have been. Kim Shayo Buchanan makes precisely this point in a recent publication, arguing that the motive the prosecution proposed—that Lee's murder was, in effect, an honor killing—activated a series of additional stereotypes which, whether by design or not, othered Syed in a manner which would normally be deemed to form an unacceptably prejudicial narrative. As such, while “the prosecution’s deployment of an anti-Muslim stereotype was not especially subtle” it was an example of a secret as defined by Kermode.[44]

One of the things that this element does is, to an even greater extent than might have been the case, place *Serial* in a lineage of true-crime narratives that goes back to the early twentieth century. The publication of the Notable Trials series, initially edited by William Roughead, in the first decade of the twentieth century, saw the production of detailed, reflective, narratives about both recent and historical cases. Significantly, several of these cases, either at the time or at a later date, became recognized as miscarriages of justice which involved the conviction of a defendant who fell outside the “inside” of British, white, male power. Florence Maybrick (American), Adolf Beck (Norwegian), George Edalji (of Parsi descent), and Oscar Slater (Jewish) were thus outsiders accused and convicted by the legal system but whom Roughead’s series allowed to be heard. Even more important, they were also cases which prompted the inauguration of courts of appeal in England and Wales (1907) and in Scotland (1926). This development has clearly had an impact on the authority and apparent closure offered by courts: indeed, it has turned them into “courts of first instance,” the prospect of reconsideration always lying in wait. And the idea of non-closure also permeated the Notable Trials volumes themselves as a sense of continuous interpretation was created through the presentation of evidential materials which allowed the readers to reach their own verdict. Non-coincidentally, this also takes place at exactly the same time as Conrad is writing an Impressionism which, as part of a nascent modernism, was intent upon open endings and on promoting the active involvement of the reader in textual interpretation. And it is precisely these features that *Serial* taps into, extending them to a point at which, as Steven Wilf points out, “the core of the podcast […] is doubt.”[45] Julia Simon-Kerr makes
p. 651 a similar point when stating that “rather than showing conclusively that Adnan Sayed ↳ is innocent, Koenig takes a narrative that had been knit together through assumptions about credibility and unravels it to the point that its true shape is a blur.”[46]

Crucially, that blur is manufactured not just through a weakening of the “kernels” which connect the *fabula*, or “central action,” but by speaking a *sjuzhet* which emphasizes different satellites. For example, in numerous recordings of telephone conversations with Syed, Koenig builds up and reflects upon an intuitive sense of what he could be capable of. While acknowledging the potential naivety of associating Syed’s likable personality with innocence Koenig (and in the experience of teaching the podcast to dozens of students over the past few years, most listeners) finds such a position hard to resist.[47] Again, the comparison between *Serial* and *In Cold Blood*, the completion of which saw Capote develop an extremely close relationship with the murderer Perry Smith, is instructive. For, just as Capote’s countless interviews and examination of documents (including psychiatric assessments of both Smith and his accomplice Dick Hickock which were withheld from the court) together with his fictional imagining of what actually happened ends in an inability to apportion moral responsibility for the murder of the Clutter family, so too, by the end of twelve episodes, Koenig is unwilling to reach a verdict as to Syed’s guilt. The imitation and extension of the trial’s investigative power has produced nothing other than the stalemate of radical doubt. But, the important point to be made here is that *this is the point*. Narratives such as *Serial* or *In Cold Blood*—or *Heart of Darkness* or one of the Notable Trials—are not supposed to conclude with a neat resolution. And the incredible popularity of *Serial* is indicative of how little modern-day readers/listeners/viewers care about such matters. Instead, it is the seductive attraction of irresolution which is so tantalizing, prompting, as it does, the proliferation of alternative theories and projections which, in the case of *Serial*, now populate the web—each of them intended only as a further possibility which serves to elongate the potential for interpretation still further.

That narrative fiction moved toward producing overt versions of such writing—what Barthes referred to as “writerly” texts—during a modernism that defined early twentieth-century literature has become a commonplace of literary history.[48] Yet, when Barthes makes the distinction between the “writerly” and the “readerly” it is in the ultimate service of showing how the codes of narrative, and especially the ambiguity of language, in fact render all narrative "writerly." The problem for the narratology which underpins the idea of narrative referred to in the first part of this chapter is that *fabula* should be "readerly"—it should simply be able to be connected, followed, accepted—but, of course, *fabula* is never what we actually get. Barbara Herrnstein Smith makes this point plain, significantly using the example of a novel by Conrad's friend and collaborator, Ford Madox Ford, when writing that in *The Good Soldier* "there evidently are *no* sets and sequences of events that, already arranged in some particular way, could be spoken of as *re*arranged."[49] For Herrnstein Smith, the very idea of a prior sequence is a fantasy, a Platonic ideal that can never be p. 652 experienced even by the literary critic. ↳ She thus writes that "what narratologists refer to as the basic stories or deep-plot structures of narratives are not abstract, disembodied, or subsumed entities but quite manifest, material, and particular retellings—and thus versions—of those narratives."[50]

So what are we left with? The answer is text, speech, language: as Peter Brooks has it, "not events in the world, but the way we speak them."[51] Conrad was aware of this and deeply skeptical as to the correspondence between the two. In *Under Western Eyes*, for instance, the novel is narrated by a "teacher of languages" who states on the opening page that "words, as is well known, are the great foes of reality."[52] Thus while the "teacher of languages" gains access to the story in a way that is reminiscent of Walter Hartright from *The Woman in White*—that is, through the testimony of others and through reading documents such as the confession penned by the novel's protagonist, Razumov—the result is virtually the polar opposite. Rather than producing narrative certainty, the conceptualization of words as "foes of reality" means that *Under Western Eyes* treads a fine line between allowing a story to emerge at the same time as continually undermining the attempt to settle upon it. If this were to be put in the terminology of deconstruction, one might say that there is always a slippage between the signifier and signified such that the latter can never fully be brought into unvarnished presence.[53] While purportedly based on an aesthetic that is attempting to be truer to lived experience—the way in which it is given as a series of raw "impressions"—this text, and others by Conrad, therefore continually draws attention to the fact that they are linguistic constructs. The primary impression Conrad wants us to have, in fact, is that we are reading a text.

35.4 Deferred Signification

Words may well be the "foes of reality"—but for this reason they could be deemed the friend of a defense lawyer. Remember that, in Kermode's analysis, Conrad's texts display a tension between logical narrative sequence *and* the transmission of non-narrative secrets. To conclude this chapter I want to suggest that a similar tension is evident in the trial, but the roles are more clearly defined. That is, while the prosecution is intent upon communicating a narrative sequence that the jury should accept (which they should read as a "readerly" text) part of the defense's job is to obstruct that sequence. In this sense, secrets are important not for what they say but for what they do. Kermode thought about this when noting the repetitious use of certain words and images in *Under Western Eyes* which "on the face of it contributes nothing to sequence—p. 653 clogs it, ↳ indeed."[54] The nature of narrative prose means that those elements which are extraneous to the structure of sequence cannot seamlessly exist either alongside or within it. Rather, by their very presence, they obscure and retard the smooth running of the narrative as sequential chain.

This point actually serves to explain one facet of Syed's original defense, the quality of which is tackled head-on in episode ten of *Serial* when Koenig asks pointedly "did she blow it?"—referring to Syed's defense attorney Christina Gutierrez.[55] The damning verdict reached is that Gutierrez failed to achieve enough clarity in her cross-examination of witnesses. In the estimation of one of the jurors, interviewed for the podcast, the defense attorney was often "talking but they're not saying nothing."[56] By contrast, Syed and Koenig both offer accounts of the prosecution narrative which emphasize its functioning as sequence, Koenig pointing out that "the state's argument, flawed as it might have been—it was at least linear" while

Syed, disarmingly for a man who claims his innocence, states that "the prosecution just did a masterful job of presenting the facts."[57] Syed's assessment of Gutierrez's defense, though polite, is less glowing:

> I don't wanna say she was confusing things—but it wasn't just a clear outline, like the prosecution had. It just seemed like everything was jumbled, like she took so long to question Jay, she took so long to cross-examine people, it was just like, it was almost like, I don't even remember what we started talking about.[58]

Koenig also plays prolonged recordings of Syed's trial to demonstrate the soporific effect of Gutierrez's cross-examination which she describes as "exhaustive and exhausting" and conducted in "half-speed pacing."[59] What this expansion amounts to, ultimately, is a swelling of language, the intention (whether conscious or not) being that the more words are involved the more "foes of reality" that are in play. Of course, it could be argued, as Thomas Morawetz does, that Gutierrez should have "described alternative stories about Hae Lee's murder," but the point being made here is that, in the absence of an alternative theory of the case, the proliferation of words is an appropriate response.[60] Playing on the autonomy, independence, and non-referential status of language divorces it from the mooring in reality that the prosecution wants to claim. In other words, while I do not want to claim that forgetting "what we started talking about" is the aim I do want to suggest that to attack a prosecution case is, in part, to widen the gap between *fabula* and *sjuzhet* (the entities which the prosecution wants to claim are virtually identical).

The prosecution wants language to be transparent signification—with the controlling author/prosecutor pointing directly to the ultimate signified that is the crime and the guilt of the defendant. The whole idea of "reconstructing reality" in the courtroom is thus the fantasy of perfect signification: the idea voiced by Bernard S. Jackson when arguing that the common law supposes that "truth does exist 'out there' and is in principle accessible to us."[61] The function of the defense is to undermine this—by questioning the logic of the causal connections and the claims to sequentiality but also, at times, by allowing language to do what it does: continually "slip" from signification. In Turow's 2010 sequel to *Presumed Innocent*, entitled *Innocent*, Stern is once again employed in defending Sabich on a murder charge and, once again, performs masterfully. Sabich's son Nat marvels at Stern's mastery of language in which every word is as "significant as each note in Mozart" and there is "a precision to every word and movement."[62] In conceptualizing the theory of literary impressionism which he founded with Conrad, Ford Madox Ford once wrote something very similar when asserting that "every word set on paper—*every* word set on paper—must carry the story forward."[63] This is precisely what he, Conrad, and Stern practice—but not in the service of a plot that moves forward inexorably to a coherent conclusion. Rather, impressionist and defense counsel are intent upon the "forward" of allusion and deferral which accentuate the inherent ambiguities of language. The genre of the trial is thus partly realist coherence, but it is also an impressionistic narrative of secrets, slippages, and the deferral of judgment.

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1 For example, in Christie’s *The Murder of Roger Ackroyd* it is the narrator who turns out to be the murderer.

2 Eliot A. Singer, “The Whodunit as Riddle: Block Elements in Agatha Christie,” *Western Folklore* 43, no. 3 (1984): 157–171, 166.

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13 Richard K. Sherwin, *When Law Goes Pop: The Vanishing Line Between Law and Popular Culture* (Chicago: University of Chicago Press, 2000), 6, 41.

14 Alan M. Dershowitz, "Life Is Not a Dramatic Narrative," in *Law's Stories: Narrative and Rhetoric in the Law*, ed. Peter Brooks and Paul Gewirtz (New Haven, CT: Yale University Press, 1996), 99–105, 100.

15 John H. Blume has argued that the limitations placed upon the defendant's capacity to name third parties as guilty of the crime which they are accused of should be relaxed—because of jurors' narrative expectations. John H. Blume, Sheri L. Johnson, and Emily C. Paavola, "Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense," *Criminal Law Review* 44 (2007): 1069–1113.

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17 This is in many ways a paraphrase of Ian Watt's classic formulation of the "philosophical realism" which he argued underpinned the novel form. Ian Watt, *The Rise of the Novel: Studies in Defoe, Richardson and Fielding* (Berkeley: University of California Press, 1959).

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19 Philip Weinstein, *Unknowing: The Work of Modernist Fiction* (Ithaca, NY: Cornell University Press, 2005), 65. Ian Watt writes that "[t]he novel's mode of imitating reality may therefore be equally well summarized in terms of the procedures of another group of specialists in epistemology, the jury in a court of law." Watt, *Rise of the Novel*, 31.

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37 Ibid., 168.

38 Ibid., 272–273.

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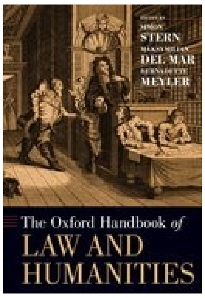

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CHAPTER

36 Maxims

Donald R. Davis

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Abstract

This chapter examines the history and use of maxims in legal traditions from several areas of the world. A comparison of legal maxims in Roman, Hindu, Jewish, and Islamic law shows that maxims function both as a basic tools for legal interpretation and as distillations of substantive legal principles applicable to many cases. Maxims are characterized by their unquestionable character, even though it is often easy to demonstrate contradictions between them. As a result, legal maxims seem linked to the recurrent desire for law to have a moral foundation. Although maxims have lost their purchase in most contemporary jurisprudence and legal practice, categories such as "canons of construction," "legal principles," and "super precedents" all show similarities to the brief and limited collections of maxims in older legal traditions. The search for core ideas underlying the law thus continues under different names.

Keywords: maxims, principles, Hindu law, Jewish law, Islamic law, Roman law, interpretation, legal history, comparison, morality

Subject: Jurisprudence and Philosophy of Law, Law and Society, Law

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THE formulation of legal maxims is a search for bedrock, both a moral and a hermeneutic foundation for the law. Maxims also represent the desire in every legal system to reduce variability in the application of law. Pithy, unassailable aphorisms are supposed to guarantee that legal interpretation is guided by uniform principles, made concrete in maxims. One of the most intriguing aspects of maxims is that they are unquestionable.[1] Even when their utility is in fact questioned, they persist. As a genre of legal literature, therefore, maxims deserve our attention because they attempt to establish either the interpretative or the moral foundations of the law itself.

In this chapter, I take a comparative approach to the use of maxims in different legal traditions in order to see their use cross-culturally and historically. Material from the Roman law, Jewish Law, Hindu Law, Islamic law, and English law traditions reveals broadly common uses of maxims in the law. I deliberately take this comparative approach in order to advocate for law and humanities research that is more historically and regionally diverse. Most law and most humanities, after all, happened in times other than now, in places other than Europe and the USA, and in languages other than English. The field dedicated to their interaction should take account of and reflect this fact.

Though I focus here on functional uses of maxims, a full consideration of maxims would also attend to their formal features such as brevity as an aid to memory, poetic elements (alliteration, rhyme, and meter), and their power in oral argumentation.[2] After placing maxims in some jurisprudential and historical context, I describe several functions of maxims as a genre of legal writing. These functions pertain to the use of maxims in legal interpretation and as unifying moral principles. The big prize in the use of maxims has long p. 656 been the notion that they impart a moral foundation to a legal system, but their ↳ use as guides to interpret the law has also been important historically. Moreover, the distinction between the two broad uses is not always clear.

36.1 The Jurisprudence of Maxims

In contemporary jurisprudence, maxims show up most prominently in the continuing debate, started by Dworkin, around the existence of legal principles, the content and history of which often conform to older maxims, and in the domain of international law, specifically the “general principles of law” in article 38, section 1.c of the Statute of the International Court of Justice.[3] In both cases, maxims as such and under that label have largely lost their purchase for modern practitioners. Nevertheless, the present appeal to principles is an extension of the past appeal to maxims. What is the connection between maxims and principles?

Roscoe Pound gives a succinct history of maxims in European legal systems beginning with Rome. In general, he argues, citing Paul Jörs, “The jurisprudence of maxims carries this [movement away from cases] still further and enters definitely on the method of beginning with ideas. It is ‘the first attempt at a theoretical formulation of law.’ ”[4] The drive toward generalization, however, leads eventually to a stage in which maxims become “empty abstractions.”[5] According to Pound, “In each case a jurisprudence of maxims helps the law pass from rules to principles and leaves a legacy of showy or oracular proverbs for the convenience or for the befuddlement of the future.”[6] These historical observations capture well the repeated formulations and collections of maxims as both convenient and well-intentioned statements of common legal principles and contradictory, unhelpful, and ostentatious brocards.

While Pound recognizes both positive and negative sides to the jurisprudence of maxims, it is fair to say that Karl Llewellyn may be credited (or blamed) for making maxims disreputable in most current legal discourse. He opens his classic essay on the theory of appellate decision as follows, “One does not progress far into legal life without learning that there is no single right and accurate way of reading one case, or of reading a bunch of cases.”[7] Though the word “maxim” does not appear in the essay, Llewellyn attacks the prevailing p. 657 notion of single correct answer to a legal question by attacking the ↳ “canons of construction” for statutory interpretation. With ample case-law citations, he lines up twenty-eight maxims of how to read law strictly against twenty-eight others that say the opposite.[8] The abundant cases in support of both columns suggest the fatal flaw in mechanically resorting to such maxims to reach a decision. For Llewellyn, maxims or canons are mere strategic ornaments on decisions arrived at by other means.[9] It is important to state that Llewellyn’s critique centered on interpretative maxims, not the invocation of maxims as moral principles. Nevertheless, his criticism drove most talk of maxims altogether, but especially interpretative maxims, underground.

Isolated defenses of particular maxims aside, the category of principles has replaced that of maxims. Dworkin himself relied upon several maxims, especially "no man shall profit from his own wrong" in his seminal articulation of legal principles as a category.[10] Dworkin is simultaneously interested in the power of principles to guide judicial decisions and to supply a moral basis to the law. The link, following Frederick Schauer, lies in the fact that Dworkin "conjoins the linguistic property of abstraction with the linguistic property of moral reference."[11] According to this view, ambiguity in language invites a moral reading of legal texts. Legal principles are necessary because they address the moral problems that underlie linguistically open legal rules. In short, Dworkin sees a role for principles (i.e., maxims) in morally guiding the discretion necessary to interpret difficult legal categories, phrases, and lines of thought.

A. W. B. Simpson points out, however, that Dworkin's approach is a sophisticated modern articulation "which pays virtually no attention to the historical pedigree of the theory involved—and the theory, like most things in jurisprudence, is of extreme antiquity."[12] Simpson demonstrates that the desire to gather a core set of principles underlying the law in order to make it both rational and moral emerges clearly in the *regulae iuris* of classical Roman jurists and as collected later in the *Digest* of Justinian. *Regula* and its Greek predecessor *kanōn* mark a movement away from law as a description of facts to fit stated rules toward law as the normative classification of behavior through concepts.[13] Medieval canonists collected Roman *regulae* into lists of maxims culminating in the *Liber Sextus* (1298), a text second only to Justinian's *Digest* as source of maxims in both civil and common law.[14] English maxims were collected in the ↳ early 1500s by St. Germain in *Doctor and Student* and by Bacon in 1630. Bacon's interest was first "to enter into a general amendment of the state of your [the King's] laws, and to reduce them to more brevity and certainty" and second, "collecting the rules and grounds dispersed throughout the body of the same laws" in order to ensure that new cases are properly judged.[15] Knowing maxims had both a pedagogical and epistemological advantage in Bacon's view, aiding young lawyers in their knowledge of the heart of the law. In the same way,[16] early modern emblems and emblem books from Europe incorporated maxims both as mnemonic devices and as symbolic tools for the development of a professional ethos of law. The collection of maxims culminates in—and largely dies with—Broom's *A Selection of Legal Maxims* (1845), which ran into ten editions up to 1939. As Simpson explains, however, "although maxims still feature in legal exposition, argument, and justification, they are now regarded as slightly comical, and the form of literature directly related to them is dead."[17] Few, if any, contemporary textbooks refer to maxims as "sources of law" as they were treated in these earlier texts. Legal treatises displaced collections of maxims as better, more theoretically valuable and thematically coherent statements of jurisprudence. Maxims could not be created (only discovered) and presumed a false intellectual unity behind the common law—two factors that helped establish their reputation as "not just antique but archaic."[18]

What we learn from this cursory overview of legal maxims in European history is that the motivation to derive, collect, and use maxims stems from a quest to establish firm rational and moral foundations of the law. The inductive distillation of legal principles into aphorisms constituted an important step toward reflective, normative jurisprudence. Efforts to keep the total number of maxims and corresponding foundations of the law to a minimum always yielded to a proliferation of increasingly empty and generic proverbs, the legal importance of which was questionable. Maxims often became a way to show off in court or in writing. Still, the persistence of maxims over a long period of time and their alternate modern life as legal "principles" suggest that the ancient desire for interpretative clarity and moral justification in the law continues.

If we examine the vocabulary of maxims in other legal systems, we see a common concern for getting to the bottom of legal things. The Sanskrit term *nyāya* signifies "that into which a thing goes back, i.e. an original type, standard."[19] In Arabic, the term *qawāʿid* connotes the foundations of something, as in a house.[20] The

Latin *maxima propositio*, literally “largest proposition,” gradually displaced the older *regula iuris* (“a rule of p. 659 law”) and its abbreviated form *maxima* was picked up in the early English ↳ collections of Fortescue, Littleton, and Bacon.[21] In every case, the term for “maxim” connotes either a wider scope of applicability or a deeper normative basis than ordinary rules. These etymologies suggest a distinction between legal maxims and legal rules, though both include a normative claim. A maxim is either wider or deeper than a normal rule. As Dworkin says, “Principles have a dimension that rules do not—the dimension of weight or importance.”[22] As an interpretative device, a maxim covers more cases and directs the application of other rules. As a moral device, it captures a fundamental principle of a legal system, representing a deeper basis for legal rules.

36.2 Interpretative Maxims

One significant use of maxims is to signpost standard hermeneutical principles expected within a given legal tradition. For example, a specific rule is stronger than a general rule, the *utsarga-apavāda* (rule-exception) maxim in Sanskrit and the fifth of thirteen interpretative rules (*middot*) of Ishmael.[23] As a maxim, invocations of this and similar rules serve to establish that a legal argument adheres to normal interpretative practice and, thus, reaches a good conclusion. Maxims thus function as shortcuts for argumentation.

Textual hermeneutics always work together with philosophies of language and, more specifically, grammar.[24] How words become categories and sentences become rules is basic to a legal interpretation of texts, and to law itself.[25] Legal maxims often distill principles of language use and understanding in the service of predictable interpretation that will be respected. A widely used maxim of Jewish law states, “The Torah speaks in human language.”[26] In a responsum by the fourteenth-century Talmud scholar Ritba, a man named Reuven gave a dowry for his granddaughter without paying the tax required by the local community for the marriages of daughters and sisters. The community’s argument was that granddaughters are legally equivalent to daughters and thus fall within the rule. Ritba, however, sides with Reuven because grandchildren are only *like* children and “with regard to all agreements between men … we p. 660 follow the sense as understood in the language of men.”[27] The maxim that conventional linguistic usage ↳ is preferable to technical scriptural usage is perhaps surprising, but the two domains are kept separate through this principle.

A similar principle operates in medieval canon law (“general words are understood in a general sense”)[28] and in Hindu law under several related maxims. The most common of these states, “Ordinary meaning overrules etymology” (*rūḍhir yogam apaharati*). The words of ritual and legal prescription should be understood in their ordinary meaning at the time of interpretation. However, a second maxim states, “Technical meanings are inappropriate when an etymological meaning exists.” A twelfth-century commentator uses the latter maxim to argue that the legal category of “women’s property” (*strīdhana*) should (as its etymology suggests) include all property held by a woman, not a smaller, technically defined portion of that property.[29] Both of these maxims work within another maxim, “The meaning of words in the Veda and in ordinary usage are the same.”[30] Together, we get a hierarchy of word interpretation: (1) scriptural meaning in the Veda = ordinary meaning, (2) etymological meaning, and (3) technical meaning. In traditions of considerable antiquity, the privilege given to conventional linguistic usage upsets the casual assumption that literal fundamentalism runs rampant in religious law and scriptural interpretation. Taking words in their ordinary meaning also implies that the current meanings might overrule demonstrably attested past meanings.

The close connection between textual hermeneutics and grammar means that some maxims are tied to the grammatical features of a specific language. For example, the *niṣāda-sthapati* maxim creates a principle for interpreting ubiquitous compound words in Sanskrit.[31] In this case, the compound could mean either "the king of the Niṣādas" or "a Niṣādan king."[32] The latter interpretation (technically called a *karmadhāraya*) requires no additional assumption or inference, while the former requires the interpreter to infer and add a grammatical relationship (here "of") between the words of the compound (a *tatpuruṣa*). The maxim establishes a principle of parsimony in how Sanskrit compounds, and other words, should be understood: interpretation should add as little as possible to the explicit words of the text. In a sixteenth-century text of ritual laws for pilgrimage, Nārāyaṇa Bhaṭṭa employs this maxim to confirm the rule that head-shaving is p. 661 required "at all pilgrimage sites," and not just at the famous site of ↳ Prayāga, because the compound *sarva-tīrtheṣu* requires it.[33] The *Vyavahāramayūkha* (seventeenth century) also uses the maxim as a concluding ornament on a long and tightly argued case for permitting members of the Śūdra class to adopt children. In this case, the argument makes heavy use of other hermeneutical concepts and reasoning and simply uses the maxim to confirm that the explicit permission in the *Laws of Śaunaka* overrides other texts that would by implication prohibit adoption by Śūdras.[34]

The second of Ishmael's thirteen hermeneutical rules is the maxim of the "equal cutting" (*gezerah shavah*), which justifies judicial analogy on the basis of similar words and traditional acceptance of the connection. For example, legal betrothal through the payment of money (to the bride) is justified through the use of the same verb for "take" in the betrothal rule and a story about Abraham's acquisition of a burial site for his wife and descendants.[35] Though fairly strong limits are placed on the use of analogy in this way, it is nevertheless a useful maxim for making connections across disparate cases and concerns. Here, too, we see the close connection of grammar and legal interpretation.

A final example centered on language is the frequent Sanskrit maxim: "Meaning extends only to the limit of the words."[36] The ninth-century commentator Medhātithi uses this maxim to reinforce the idea that members of the lowest legal class, the Śūdras, are permitted to undertake only those specific ritual and legal acts allotted to them by the legal texts and not others. The interpretation narrows the potentially wide scope of the main rule, "A Śūdra has no qualification with regard to the Law, but he is not prohibited from following the Law."[37]

Maxims often signal circumstances in which inferences and analogies of several kinds are permissible. The seductive solidity of texts and of textualism means that inferences about the applicable law in new situations are suspicious. A very common inference maxim—the *daṇḍā-pūpa* maxim in Sanskrit, *qal wa-ḥomer* in Hebrew, and *a minore ad maius* in Latin—lays down the legitimacy of a fortiori arguments: if x is true of a lesser or secondary instance, how much more must x be true of a greater or primary instance.[38] In Hindu law, for example, the maxim supports an argument that any brother who hides or withholds property at the time of partition is subject to criminal liability. A text that specifies the culpability only of elder brothers is refuted via the maxim on the grounds that if it is a crime for an elder brother, then "by the principle of the *daṇḍā-pūpa* maxim the fact that it is a crime for the younger brothers is shown to an even higher degree."[39]

p. 662 Medieval canonists often turned to analogical reasoning by using parallel passages in which terms and phrases were clear to interpret passages in which they were ambiguous.[40] Following the maxim "Render not word for word, but sense for sense," judges were exhorted not to focus too narrowly on specific words but to interpret from larger context and the whole of a given work.[41] The legitimation of analogy and inference through maxims signals that the use of maxims does not at all imply strict textualism. Many of Ishmael's exegetical maxims, for example, concern the proper way to make inferences about issues not directly stated in the text. Given the suspicions of literalists who fear the intrusion of subjective whim and emotions into legal interpretation, the maxim served as a useful tool for permitting linkages between clear and ambiguous cases. If a maxim could be convincingly applied to both, then a reason to apply a law by analogy could arise through the maxim in a way that remained within the textually sanctioned world.

It is, of course, rare that interpreters, especially professional or otherwise skilled, fail to come to a clear conclusion in cases of doubt. Most legal traditions, however, also put a considerable burden on ordinary individuals to know and interpret the law. Therefore, one of the least desirable situations is two rules that, even after careful consideration, impose two obligations that cannot both be performed. In Shīʿī jurisprudence, the "either-or" (*takhyīr*) maxim used by Ṣadr legitimates the performance of just one of the two possible obligations without penalty.[42] Hindu law emphasizes that the comparable maxim of "optionality" (*vikalpa*) is the worst possible result of interpretation (though sometimes unavoidable).[43] What I find most interesting about this maxim is the drive toward completeness that it reveals. There should be a rule or maxim governing every possible situation. Maxims assisted in this effort by covering wide areas for which explicit rules did not exist. Even a situation in which rules flatly contradict had to be brought within the scope of what is interpretable. As a hermeneutic last resort, optional laws ultimately appeal to personal preference, conscience, or other internal intuition.[44]

In general, interpretative maxims guide jurists, judges, and lawyers through the tricky understanding of legal texts. Stein describes such maxims as "a catch-phrase for use in legal argument … the principle which lies at the back of various rules of law, but no one expects that it can itself be applied without considerable qualification."[45] While certainly true in many contexts, this description implies an insincerity in the use of maxims that I do not see in most contexts. Ornamental or rhetorical uses of maxims in legal argument and
p. 663 decision are a prominent style of maxim usage. Here, a maxim carries weight ↳ not because a critical interpretative move depends on it but because it sounds right in context. As the examples above show, however, the more common use of interpretative maxims suggests that authors framed cases and facts in such a way as to enable a maxim to apply. The unquestionable character of a maxim made it a good choice for conclusive statements of law and its interpretation.

36.3 Substantive Maxims

In contrast with interpretative maxims, substantive maxims express a principle that addresses the content of the law, not its interpretation. The distinction between the two types of maxims is blurry, however, since interpretations lead to substantive consequences and substantive principles guide interpretation. In the best study of how maxims function within a particular legal tradition, Intisar Rabb explores the maxim "avoid criminal punishments in cases of doubt" in Islamic law.[46] She traces the long history of the acceptance and use of this maxim over several centuries, links this maxim to others (both interpretative and substantive—the division is, in fact, hers), and describes the reasons for the disappearance of maxims in Muslim legal thought, along with their recent resurgence. Rabb states, "this canon functioned—as do canons in other legal traditions—as a kind of 'super-precedent' for which specific attribution was either uncommon or unnecessary."[47]

In a brilliant comparative analysis, Rabb describes the different trajectories of canon law and Islamic law over time, even though both traditions early on developed strong canons or maxims of doubt, especially in cases of criminal offense. Jurists in both traditions feared that making a wrong judicial decision that led to punishment of another person would entail sin and damnation. Following the work of Whitman on the reasonable doubt standard, Rabb states, "heightened procedures for criminal trials grew out of a world of moral anxieties facing judges about the very act of judging."[48] Many familiar elements of American criminal law—higher standards of proof, the presumption of innocence, the rule of lenity, etc.—trace their historical origins to early maxims constellated around doubt.[49]

The arc of history for Muslim jurists was quite different, however. In Rabb's words:

> With no moral theology to absolve doubt and no state to assert absolute control over the authorization of punishment, medieval Muslim jurists had both moral and institutional reasons to deploy a procedure-laden, robust doctrine of doubt. ... They used doubt to alleviate a deep sense of moral concern with false convictions, to rein in rather than work with the political rulers in punishment, and to construct a version of Islamic law in line with their ideals of divine legislative supremacy.[50]

p. 664 Where Christian legal professionals found procedural ways to absolve judges of responsibility for the negative religious effects of overpunishing or punishing the innocent, Muslim jurists stopped at heightening procedures as a bulwark against wrong decisions but never let procedure absolve judges of their religious and moral culpability. The direct and indirect effects of the maxim of doubt in criminal law touched huge substantive areas of the law and forced distinctions not just in criminal law but also in the formation of separate standards and expectations for civil wrongs and actions.

Beyond the maxim of doubt, by the eleventh century CE, Islamic law had also settled on five substantive “universal legal maxims”: (1) harm is to be removed; (2) custom is legally authoritative; (3) hardship requires accommodation; (4) certainty is not superseded by doubt; and (5) acts are to be judged according to their aims.[51] These broad principles gave the theoretical structure of practical law in Islam a foundation. At the same time, “Since they cover a large number of sub-*qawāʿid* [maxims], it is questionable, whether they were important for the everyday legal work of the *fiqh* [practical jurisprudence].”[52] The impetus to capture core moral foundations of the Islamic legal tradition through a small set of substantive maxims reveals the close connection of maxims and morality.

Most substantive maxims, however, take a more specific form. Also in the domain of criminal law, early Jewish law developed the maxim that “there is to be no punishment for any act not previously proscribed.”[53] The parallel to the Latin maxim “no punishment without a law” (*nulla poena sine lege*) is obvious, even if the application of the two differed. The paternity maxim in Islamic law “stipulates that paternity is assigned based on the known marital relationship of a contested child’s mother.”[54] The canon law maxim “when the law is unclear, the minimum is to be followed” (*in obscuris minimum est sequendeum*) is one of several that restrained aggressive application of the law in situations of interpretative uncertainty.[55] If we elaborate a few further examples, the role of substantive legal maxims should become clear.

A rule of Hindu law in the *Laws of Yājñavalkya* (2.259) states that the profits and losses in a business partnership are to be shared according the capital invested or a contract made. A later rule (2.265) extends the same law to priests, farmers, and artisans. The commentary on the second rule says that different priests receive different shares for their work, to which an objection is raised based on the maxim “Things should be equal unless there’s an explicit text.”[56] The objector sees no unequal investment or contract in the work of priests, so the maxim should hold. The commentator, however, marshals several texts to demonstrate the distinctive contribution of each priest at a rite, according ↳ to which they unequally share the ritual fee. Though the maxim fails to apply in this case, we can infer from its invocation a principle underlying the whole section on partnerships, namely, that partners share equally unless they contribute unequally to the success or failure of the joint venture. p. 665

A decision of Judah Minz in the fifteenth century uses the maxim of generalization-specification-generalization (sixth on Ishmael’s list of thirteen exegetical maxims) to argue that the majority of a given community may compel a minority to comply legally in matters of public concern.[57] In such cases, the specification is understood to guide judicial decisions by constraining the scope of the first generalization, but not necessarily to all cases that might fall under the second generalization.[58] In the case at hand, Minz relied on an earlier responsum of Maharam of Rothenburg, in which the following sequence of rules appeared: “ ‘*All* taxpaying householders should be assembled’ after which he made *specific* rulings—they should ‘follow the majority in regard to choosing leaders, etc.,’ following which he made a *general* ruling:

‘all the needs of the community should be satisfied by them as they determine.’ ”[59] Normally, a specification would restrict the application of the wider rule to the named cases, but the second general rule is held to open up the restrictions. The result is akin to treating the specifications as illustrative, but not exhaustive cases. Application of the same rule to other specific instances should be guided by both broader rules, just as the enumeration of specifics should guide the cases to which the rules apply. This decision serves as a good example of an exegetical rule being used in the service of substantive purpose of law, namely, to legitimate the principle of majority rule in public matters.

Finally, the maxim “Protect the gold” is used to refute the assertion that wealth is meant only for use in a sacrifice.[60] The maxim comes from an explicit Vedic text and, from its context, was received as indicating a general obligation for mankind and not a specific act (of burnishing, etc.) within the sacrifice itself. The assertion that wealth is for sacrifice alone is one of several reasons given in the text for disallowing women to inherit property, since they are not permitted to perform sacrifice. The commentator deploys this maxim as one piece of the larger refutation of the objections to women’s inheritance. His case is rather that wealth is used for many purposes, not just sacrifice, and that women who inherit can use that wealth for pious gifts, other rites, and worldly uses without contradicting the prohibition against women offering sacrifices. In this way, the maxim guarantees a legal function for wealth apart from the highly restricted ancient sacrifice and, in so doing, legitimates the inheritance rights of social groups (women, lower classes, and children) barred from other ritual and legal practices.

The sixth-century *Digest* of Justinian (especially section 50.17) is often cited as a major source of Latin legal maxims that had emerged by the end of the classical period of Roman law.[61] As a purposeful distillation of p. 666 the accumulated law of Rome, this work ↳ shows us another function of maxims, namely, the preservation of customary laws. *Digest* 50.17.2 records the maxim of Ulpian barring women from civil and public functions; 50.17.8 states that civil law cannot destroy rights of blood relationship; in 50.17.107, Gaius says, “There is no action with a slave.”[62] Other rules refer to Roman legal institutions (praetor, edict, delict, citizenship, manumission, etc.) in a way that ties many of these maxims to the history of Rome. Even beyond the two hundred or so maxims collected in its last section, the *Digest*, in fact, collects rules in pithy form in all its sections that are often undistinguishable from maxims. Together, these maxims or maxim-like rules digest in part the substantive legal heritage of Rome. The precise origins of the maxims and rules in the *Digest* are something specialists track down and fight about, but it is hard not to see the work of these maxims as putting together the customary norms of Roman law, even if not always in the technical sense of custom (*consuetudo*).

Hindu law shows the same proclivity to form the law itself as collections of maxims. According to Rocher, “Many of the legal prescriptions in the Dharmaśāstras must be more or less literal renditions of the mass of floating versified maxims which were current in India from very early times and in many fields.”[63] In other words, the core legal texts of the Hindu tradition themselves originated *in part* from unwritten customary law captured in aphoristic verses.[64] The subsequent scholastic tradition then used other interpretative maxims from within the tradition to elucidate and extend the earlier texts. An old purpose of maxims, therefore, is to serve as early concretizations of customary laws and preservations of prior legal wisdom. In this sense, maxims are an instance of present law drawing on its own past, “the law observing itself.”[65] The capacity of maxims to capture key legal ideas succinctly accounts best for the historical rise of maxim collection and their proliferation in ancient law. Over time, their primary purpose changed.

Everywhere there are legal maxims, there is a concern that the law have a moral foundation. As Maitland noted long ago, “Equity acts *in personam*—this has been an important maxim.”[66] The emphasis on the person is about justice and finding a way to make sure immoral results at law can be remedied in another way. Ideally, the two systems, law and equity, work together: “Equity had come not to destroy the law, but to fulfil it. Every jot and every title of law was to be obeyed, but when all this had been done yet something might be needful, something that equity would require.”[67] English courts of equity and their associated maxims relied heavily on these pithy summaries of the moral principles that were supposed to operate in these distinctive legal fora.[68] In other historical contexts, too, maxims are preserved and invoked as a form p. 667 of reassurance and ↳ security that a decision was not only legal but also moral. The capacity of maxims to embody moral aspirations explains the resurgence of maxim use in early modern European legal systems right through to almost the twentieth century. It also explains their persistence under other names even today.

36.4 Conclusion

The magic of the maxim is that it can hide its historicity. Once a maxim is formulated and accepted, it loses its character as a changeable rule and becomes a fixed reference point for interpretation, argumentation, and moral justification. As Stein says, "What makes a proposition a maxim for the common lawyers of the late fifteenth century was not so much its degree of abstraction or its epigrammatic form but the fact that it could not be challenged. Maxims were regarded as part of the original structure of the law, and to object to them was tantamount to denying the law itself. … To describe a rule as a maxim was for a common lawyer akin to attributing it to natural reason for a Roman lawyer."[69] Maxims appear natural, commonsensical. In that naturalness, they continue to reappear in legal systems under many names. Contemporary invocations of "common sense," for instance, seem tied to the same desire to inject moral principles into the strict letter of the law.[70] The long history of maxims seems tied to the possibility that they can grasp the moral core of the law, its deep foundations. It does not seem to matter whether there actually is a moral core or deep morality in the law; people clearly *want* there to be one. To this extent, maxims represent the moral aspirations of a legal tradition.

As part of legal interpretation, the unquestionable nature of maxims makes them perfect for rhetorical flourish and ornamentation. A standard modern textbook of rhetoric declares, "The value of maxims, according to Aristotle, is that they invest a discourse with 'moral character,' with that ethical appeal so important in persuading others."[71] The moral appeal of the maxim can be manipulated rhetorically by the legal commentator, lawyer, or judge. More common historically, though, interpretative maxims tried to give a given legal tradition common techniques for understanding complex original legal texts and subsequent layers of interpretation and reformulation of the law. And the fewer, the better. The perfect interpretative maxim generalizes; it covers or anticipates many and varied cases. A core set of maxims in theory could provide a standardized way to know the law and thus make it predictable. Of course, no set ever functioned perfectly and most systems spun out further maxims with increasing zeal, only to defeat the p. 668 very purpose for which they were intended. At that point, someone like ↳ Llewellyn notices that the ocean of maxims contradicts itself at every turn. Some call for literalism; others demand reason; still others suggest a pragmatic turn to intention.

No matter the response, what seems to happen is that maxims reappear in another form. Today's "canons of construction," "legal principles," and "super precedents" strike me as variations on the theme that Simpson identified as a deep pattern in the history of law, namely, the unending search for core ideas.[72] All of these are also variants of the maxim as well. In spite of the views of maxims as silly and antiquated, even traditional maxims continue to resurface in new places. We may point, for instance, to the scores of Latin maxims cited by the Polish Constitutional Tribunal just since 1997 to see that maxims are not out of fashion.[73] Others have turned to maxims as universal ideals that might facilitate a human rights discourse.[74] For my point, it does not matter whether these or other contemporary uses of maxims work or convince. The point is that they persist. In that persistence lie insights about the limits of rules, the layers of normative structure in the law, the perceived need for interpretative standardization and moral foundation, and inescapable seductiveness of the well-stated idea.

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2 A brief description of Latin maxims, orality, and poetry can be found in Peter Tiersma, *Legal Language* (Chicago: University

of Chicago Press, 1999), 26–27.

3 For a summary of the statute's "general principles of law as recognized by civilized nations," see Christina Voigt, "The Role of General Principles in International Law and their Relationship to Treaty Law," *Retfærd Årgang* 31 (2008): 3–25. Most general principles are "known through Latin maxims." See Marcelo Kohen and Bérénice Schramm, "General Principles of Law," in *Oxford Bibliographies: International Law* (2013), http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0063.xml.

4 Roscoe Pound, "The Maxims of Equity—I: Of Maxims Generally," *Harvard Law Review* 34 (1921): 809–836, 814.

5 Ibid., 819.

6 Ibid., 823–824.

7 Karl N. Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed," *Vanderbilt Law Review* 3 (1959): 395–406.

8 Ibid., 406.

9 Geoffrey P. Miller, "Pragmatics and the Maxims of Interpretation," *Wisconsin Law Review* 1990 (1990): 1179–1228, 1180.

10 Ronald M. Dworkin, "The Model of Rules," *University of Chicago Law Review* 35 (1967): 14–46.

11 Frederick Schauer, "Constitutional Invocations," *Fordham Law Review* 65 (1997): 1295–1310, 1299, n. 16. Compare Dworkin, "Model of Rules," 28: "Words like 'reasonable,' 'negligent,' 'unjust,' and 'significant' often perform just this function. Each of these terms makes the application of the rule which contains it depend to some extent upon principles or policies lying beyond the rule, and in this way makes that rule itself more like a principle."

12 A. W. B. Simpson, "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature," *University of Chicago Law Review* 48, no. 3 (1981): 632–679, 641.

13 Peter Stein, *Regulae Iuris: From Juristic Rules to Legal Maxims* (Edinburgh, Scotland: Edinburgh University Press, 1966), 47–48.

14 Pound, "Maxims," 819. See also Frederick Pollock and Frederic William Maitland, *The History of English Law*, 2nd ed. (Cambridge: Cambridge University Press, 1898), 218: "When in any century from the thirteenth to the nineteenth an English lawyer indulges in a Latin maxim, he is generally, though of this he may be profoundly ignorant, quoting from the Sext."

15 Francis Bacon, *Works of Francis Bacon, Vol. IV, Law Tracts* (London: Crowder and Hemsted), 8, 10.

16 As shown by Valérie Hayaert's chapter, "Emblems," in this volume.

17 Simpson, "Rise and Fall," 650.

18 Ibid., 651.

19 Monier Monier-Williams, *A Sanskrit-English Dictionary* (Oxford: Clarendon Press, 1899), 572.

20 Fawzy Shaban Elgariani, "Al-Qawa'id al-Fiqhiyyah (Islamic Legal Maxims): Concept, Functions, History, Classifications and Application to Contemporary Medical Issues," PhD diss., University of Exeter, 2012, 40.

21 Stein, *Regulae Iuris*, 156–176.

22 Dworkin, "Model of Rules," 27.

23 For the standard lists of Talmudic interpretative principles (*middot*), see H. L. Strack and Günter Stemberger, *Introduction to the Talmud and Midrash*, 2d ed., trans. Markus Bockmuehl (Minneapolis, MN: Fortress, 1996), 15–30. A careful study of Rabbi Ishmael and the origins of legal midrash (including maxims) is Azzan Yadin, *Scripture as Logos: Rabbi Ishmael and the Origins of Midrash* (Philadelphia: University of Pennsylvania Press, 2004). For a study of ethical *midrash*, including maxims in a wider sense, see Jonathan Wyn Schofer, *The Making of a Sage: A Study in Rabbinic Ethics* (Madison: University of Wisconsin Press, 2005).

24 On Roman law maxims and grammar, see Stein, *Regulae Iuris*, 53–67.

25 Paul Dresch and Judith Scheele, eds., *Legalism: Rules and Categories* (Oxford: Oxford University Press, 2015).

26 Strack and Stemberger, *Introduction*, 20.

27 Louis Jacobs, *Jewish Law* (West Orange, NJ: Behrman House, 1968), 189.

28 James A. Brundage, *Medieval Canon Law* (New York: Longman, 1995), 160.

29 Narayan Ram Acharya, ed., *Yājñavalkyasmṛti with the commentary Mitākṣarā of Vijãneśvara* (Delhi, India: Nag, 1985), 2.143, *(yogasambhave paribhāṣāyā ayuktatvāt)*.

30 Ganganath Jha, *The Pūrva Mīmāṃsā Sūtras of Jaimini, Chapters I-III* (Allahabad, India: Pāṇini Office, 1916), 91 [1.3.30]. This text provides reasons for this principle: "because there are no discernible differences between the words and because we would not feel compelled to act on what the Veda prescribes if we could not understand it."

31 P. V. Kane, *History of Dharmaśāstra*, Vol. 5, (Poona: Bhandarkar Oriental Research Instituted, 1962–75), 1345 [*Pūrva Mīmāṃsā Sūtras* 6.1.51].

32 The immediate question is one of status: a king who rules the Niṣādas, a low-status community, may not himself be a Niṣāda. A ritual text specifies that a "Niṣāda-king" should perform a certain part of a rite. A king is eligible, but not a Niṣāda. Nevertheless, the express mention creates a principle that also creates an exception.

33 Richard Salomon, *The Bridge to the Three Holy Cities: The Sāmānya-praghaṭṭaka of Nārāyaṇa Bhaṭṭa's* Tristhalīsetu (Delhi, India: Motilal Banarsidass, 1985), 283–290.

34 P. V. Kane and S. G. Patwardhan, *The Vyavahāramayūkha of Nīlakaṇṭha* (Poona, India: Āryasaṃskṛti Press, 1933), 109–115.

35 Arnold Cohen, *An Introduction to Jewish Civil Law* (Jerusalem, Israel: Feldheim, 1991), 40–41.

36 Kane, *History of Dharmaśāstra*, Vol. 5, 1348 (*yāvad vacanaṃ vācanikam*).

37 Patrick Olivelle, *The Law Code of Manu* (New York: Oxford University Press, 2004), 188–189.

38 See J. D. M. Derrett, "A Problem in the Book of Jubilees and an Indian Doctrine," *Zeitschrift für Religions- und Geistesgeschichte* 14 (1962): 257–258. The Sanskrit maxim is also called the *kaimutika-nyāya*.

39 Acharya, *Mitākṣarā*, 2.126.

40 Brundage, *Medieval Canon Law*, 169–170.

41 Ibid., 169 (*non verbum ex verbo sed sensum ex sensu transferri*).

42 Intisar A. Rabb, *Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law* (Cambridge: Cambridge University Press, 2015), 310. It should be noted that this is an inferior solution to others that Ṣadr propounds.

43 Donald R. Davis, Jr., "Maxims and Precedent in Classical Hindu Law," *Indologica Taurinensia* 33 (2007): 33–55.

44 Hindu law calls this appeal "what pleases oneself" (*ātmatuṣṭi*), a seemingly open-ended "source of law" that the tradition was quick to restrict.

45 Stein, *Regulae Iuris*, 105.

46 Rabb, *Doubt in Islamic Law*.

47 Ibid., 55.

48 Ibid., 128.

49 Ibid., 129.

50 Ibid., 131.

51 Ibid., 352–353. The precise list of five maxims varies slightly in the works of different Muslim authors.

52 Wolfhart Heinrichs, "*Qawāʿid* as a Genre of Legal Literature," in *Studies in Islamic Legal Theory*, ed. Bernard G. Weiss (Leiden, The Netherlands: Brill, 2002), 374.

53 Menachem Elon, *Jewish Law: History, Sources, Principles*, trans. Bernard Auerbach and Melvin J. Sykes (Philadelphia: Jewish Publication Society, 1994), 373.

54 Rabb, *Doubt in Islamic Law*, 353.

55 Brundage, *Medieval Canon Law*, 171.

56 Acharya, *Mitākṣarā*, 2.265 (*samaṃ syād aśrutitvāt*).

57 Elon, *Jewish Law*, 418–421.

58 Ibid., 326.

59 Ibid., 420.

60 Acharya, *Mitākṣarā*, 2.135–136.

61 Alan Watson, *The Digest of Justinian*, 4 vols. (Philadelphia: University of Pennsylvania Press, 1985).

62 Ibid., 4:471, 4:477.

63 Ludo Rocher, "Hindu Conceptions of Law," in *Studies in Hindu Law and Dharmaśāstra* (London: Anthem, 2012), 39–58, 54.

64 The story is more complicated in Hindu law, and also of course in Roman law. On Hindu Law, see Donald R. Davis, Jr., *The Spirit of Hindu Law* (Cambridge: Cambridge University Press, 2010), 146–147.

65 D. Neil MacCormick and Robert S. Summers, *Interpreting Precedents: A Comparative Study* (Brookfield, VT: Ashgate, 1997), 1.

66 F. W. Maitland, *Equity, Also the Forms of Action at Common Law: A Course of Two Lectures* (Cambridge: Cambridge University Press, 1910), 258.

67 Ibid., 17.

68 On maxims and equity, see Williams, "Role of Rules," 199–201.

69 Stein, *Regulae Iuris*, 160.

70 Patricia Cochran, *Common Sense and Legal Judgment: Community Knowledge, Political Power, and Rhetorical Practice* (Montreal: McGill-Queen's University Press, 2017). Cochran demonstrates that "common sense" can be a weapon for both oppression and liberation, depending on its formulation.

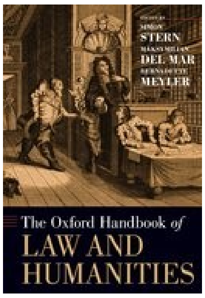
71 Edward P. J. Corbett and Robert J. Connors, *Classical Rhetoric for the Modern Student*, 4th ed. (New York: Oxford University Press, 1998), 128.

72 On "super-precedents," see Michael J. Gerhardt, "Super Precedent," *Minnesota Law Review* 90 (2006): 1204–1231.

73 Krzysztof Szczygielski, "Latin Legal Maxims in the Judgments of the Constitutional Tribunal of Poland," *Studies in Logic, Grammar and Rhetoric* 49 (2017): 213–223.

74 J. Stanley McQuade, "Ancient Legal Maxims and Modern Human Rights," *Campbell Law Review* 18 (2006): 75–120. As Anker concludes in the present volume, human rights is a "both-and" discourse that tacks between critique and affirmation in

order to expose oppression and to prescribe a normative future. The role of maxims or principles as instruments of moral critique for a legal edifice founded upon prescriptive rules strikes me as striving for a similar “both-and” operation of law.



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CHAPTER

45 Comics

Hillary Chute

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Abstract

The art form of comics has been at center of heated global free speech debates, which remain among the defining issues of our time, particularly as they map onto cultural and religious difference. In the past ten years, the hybrid word-and-image medium of comics has also entered the legal arena through comics-form amicus briefs and comics-form contracts, to name a few examples. The examples suggest that comics is understood today not only as a medium with the potential to be sophisticated, literary, and entertaining but further as one with the concision and clarity that legal discourse values. The growing international energy around the intersection of comics and law, evident in the emergence of comics-form documents and comics as a mode of legal pedagogy, is also reflected in the academy, where there has been a large recent increase in legal academic attention to comics. Other comics genres, particularly nonfiction genres (e.g., comics journalism and graphic memoir), have also proven to be richly engaged with the juridical. Comics that address complicated ethical and material realities through content and form alike model productive ways of engaging with aesthetics and the juridical imaginary, including compelling but fraught legal discourses like that of human rights. This chapter focuses in particular on the non-fiction work of Malta-born cartoonist Joe Sacco, suggesting that Sacco, perhaps more than any other cartoonist, helps readers to see how the comics form can reveal the law-driven focus on "rights" differently than in traditional accounts, especially through the medium's approach to layered temporalities.

Keywords: comics, human rights, comics journalism, international law, testimony, witness, formalism, framing, temporality, haunting

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> It's like learning a new syntax, a new way of ordering ideas.[1]
>
> —Alison Bechdel on comics

IN the past ten years, the art form of comics has entered the legal arena in some surprising ways. In 2012, the lawyer Bob Kohn enlisted a young cartoonist, Julia Alekseyeva, to create an amicus brief in the form of comics, which he filed in federal court in New York in an antitrust case. Kohn, an expert in music licensing law, was limited for his brief to five pages; in his frustration with the page length he turned to the economy of comics. Kohn and Alekseyeva made his full range of points in comics frames with both words and images and still managed to produce the brief with the requisite one-inch margins and twelve-point (or larger) type. Kohn's side, opposing an antitrust settlement proposed by the Justice Department, lost the case, but his brief, its form a first, gained plenty of fascinated attention, from the *ABA Journal* to *Publisher's Weekly* to the *New York Times*.[2] The judge, approving the settlement the next day, did not address the unusual brief, but, perhaps inspired by Kohn's form-bending, she notably quoted Emily Dickinson in her ruling.

And we see comics appear these days even in contract law. The comics-form contract, an innovation that aspires to maximum clarity and was popularized by South African attorney Robert de Rooy, has recently picked up steam. One of the best-known examples is the sixteen-page comics contract de Rooy produced for Jincom, funded by the Indigo Fruit Company. It's a thoroughgoing fruit-picker contract for citrus farms. The Jincom contract is legally binding; the agreement is portrayed in pictures, and the parties sign the
p. 822 actual comic as the contract. Initially, de Rooy explains, he was worried that workers ↳ would perceive the contract as patronizing, but that has proven, so far, across different contracts and contexts, not to be the case. The contracts are created, as de Rooy notes, "for people who are illiterate, people who are not literate in the language of the contract, employers with multi-cultural workplaces or companies that wish to transact with people who suffer from reading or intellectual disabilities. We want to enable people to be able to independently understand the contracts they are expected to sign."[3] Comics contracts "are potentially usable in all types of agreements," notes Camilla Andersen, a professor at the University of Western Australia, which hosted the Comics and Creative Contracts Conference in 2017.[4] The conference shone a spotlight on American cartoonist R. Sikoryak's ingenious comics adaptation of the long, dense, and widely-acknowledged-as-going-unread legal document iTunes Terms and Conditions. Sikoryak's *Terms and Conditions*, also from 2017, quotes the agreement verbatim in ninety-four pages of comics. A noted satirist with the technical capacity to mimic any cartoonist's style, Sikoryak features on each page an avatar of Apple cofounder Steve Jobs folded into a parody of a different well-known comics work, from Alison Bechdel's *Fun Home* to Chris Ware's *Jimmy Corrigan* to Allie Brosh's *Hyperbole and a Half* and Bil Keane's *Family Circus* and Jim Davis's *Garfield*.[5]

These examples reveal two different legal genres, the brief and the contract, taking shape in comics form and circulating imbued with the same legal authority as traditionally conceived and received prose-only documents. The examples suggest that the hybrid word-and-image form of comics is understood today not only as a medium with the potential to be sophisticated, literary, and entertaining but further as one with the concision and clarity that legal discourse values. A form known for its density of information (in its combination of visual and verbal discourses) as well as its powers of distillation, comics may present, then, in certain iterations, a lower bar to accessibility without, ideally, sacrificing complexity. Innovation at the intersection of comics and law from this angle involves figuring out ways to take comics seriously as a form of communication for use in clearly marked legal arenas, like the courtroom, and legal interactions, like binding agreements.One also recognizes comics' ability to convey dense information economically in the recent emergence of pedagogical comics in law at all levels. In India, for instance, lawyer sisters Kanan Dhru and Kelly Dhru founded the educational comics series Lawtoons, which explains the fundamental rights covered under the Indian Constitution through comics stories and characters. (The concept of visualizing law, and visualizing rights specifically, is also reflected in recent initiatives such as the interdisciplinary
p. 823 Legal Design Lab, hosted at Stanford Law School's Center on the Legal Profession and ↳ launched in 2016.) The first Lawtoons book collection appeared in both Hindi and English versions in 2017; Kanan Dhru, in Lawtoons' appealing online crowdfunding video, clarifies she wants to change, through comics, the fact that "people get scared just by thinking of law and lawyers."[6] One also sees comics as a vehicle for legal

education in work such as criminal defense attorney Nathaniel Burney's *The Illustrated Guide to Criminal Law*—a book I first read about on the website of the Law Librarians of Congress at the US Library of Congress, in a 2015 blog post titled "Comics and the Law." Burney began his "Illustrated Guide to Law" in 2011 as a webcomic on the still active www.lawcomic.net; it proved so popular that he now publishes an ongoing book series.

The growing international energy around the intersection of comics and law evident in the emergence of comics-form documents and comics as a mode of legal pedagogy is also reflected in the academy, where there has been a large recent increase in legal academic attention to comics. The overlap of comics and the law inspired a special issue of the journal *Law Text Culture* titled "Justice Framed: Law in Comics and Graphic Novels" (2012), edited by Luis Gómez Romero and Ian Dahlman. Similarly, *Law and Humanities, Law & Literature, International Journal for the Semiotics of Law*, and *London Review of International Law* have published on comics of late; the past decade has seen a steady uptick in such work. Further, the publication of *Graphic Justice: Intersections of Comics and Law*, an academic book collection edited by Thomas Giddens, is a landmark event that signals the creation of a newly codified line of inquiry.

Graphic Justice largely focuses on the content of comics stories and how those stories thematize jurisprudence and in some cases push back on weaknesses in—and even fundaments of—established legal systems. The analysis often lands on popular fantasy genres, such as superhero comics; for instance, two essays discuss the character Judge Dredd (a staple of British comics since the late 1970s), a judicial/law-enforcement officer in a dystopian future city, and other essays primarily focus on characters created by DC and Marvel, addressing mainstays such as *Watchmen* and *Daredevil*, along with various iterations of *Batman*, which occupy several contributions. The volume analyzes the law as it is presented in comics, primarily through superhero plots and their forms of meaning-making. Nickie D. Phillips and Staci Strobl, the authors of *Comic Book Crime*, straightforwardly frame the interest in and narrative frisson created by superheroes: "One of the most interesting facets of the superhero genre is the preoccupation with justice that manifests as an ongoing tension between public safety and individual rights. … The criminal justice system in comic books operates on a continuum between two ideals: crime control and due process."[7] Indeed, the entire superhero genre—starting with Superman, in 1938—is deeply shaped by a preoccupation with crime and the parameters of law.

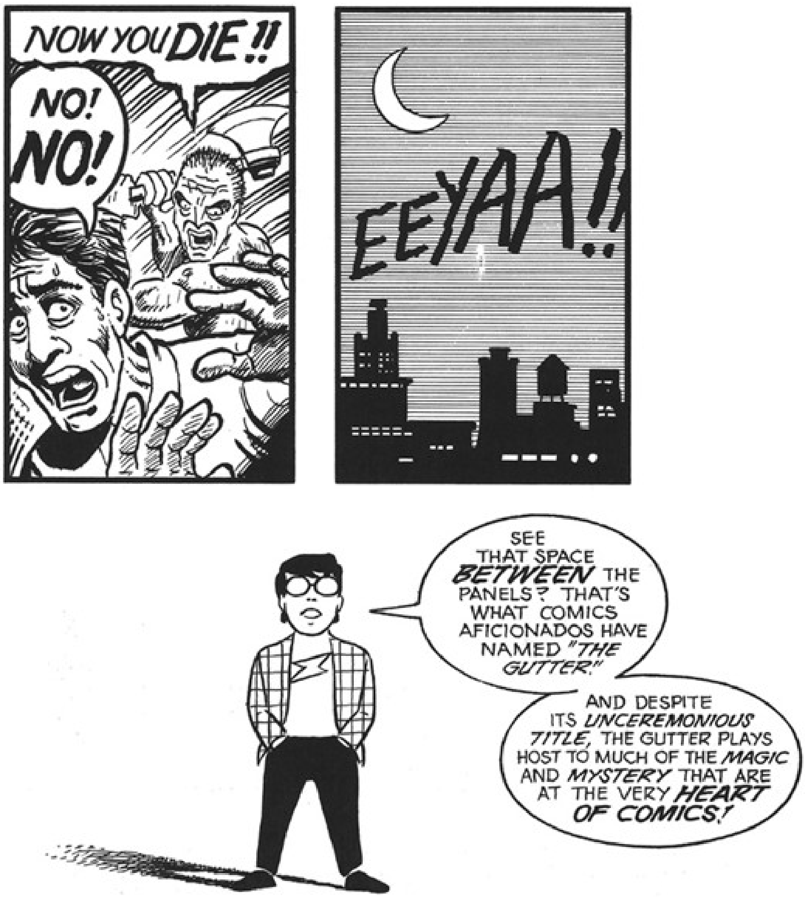
For the purposes of discussing the medium's role in the interdisciplinary inquiry of law and the humanities, this chapter is interested in the world-making—and world-undoing—capacities of comics that traffic in expressing historical and experiential realities, particularly the complexity of how time operates in comics in relation to the legal. It is also interested in how the form and content of comics work with and against juridical lines of inquiry, sometimes uneasily—how the form can engage readers in contemplating questions of what law does and should do and what art does and should do. Although their existence is fascinating, especially as an index of legal thinking outside the box, I am not only interested in comics that can be law, as in contracts; or in comics that teach law, as in didactic guides; or in comics that produce elaborate fantasies, contained within diegetic spaces, of the disjunct between law and justice that reflect back on extant sociocultural and political anxieties. Rather, comics that address complicated ethical and material realities through content and form alike model productive ways of engaging with aesthetics and the juridical imaginary, including compelling but fraught legal discourses like that of human rights.[8]

Indeed, in addition to superhero comics' focus on crime and justice, the medium has been shaped, both now and in its history, by significant legal entrenchments, and also by a focus in its content on the law in its various manifestations. Comics has been embroiled in numerous battles about copyright and authorship, as Marc Greenberg details in the thorough, informative *Comic Art, Creativity, and Law*. And in one of the most important events in the history of medium, in 1953, the United States Senate Judiciary Committee established the Subcommittee on Juvenile Delinquency (known colloquially as the Kefauver committee), which probed the link between comic-book content and juvenile delinquency, through the perceived violent and sexual content of comic books.[9] Its outcome was an industry-created censorship code called the Comics Code. An aesthetically and culturally important era of comics, often called the Golden Age, ended with the hearings—which were also responsible, indirectly, for creating a major underground comics movement in the wake of the creation of new rules about commercial content.

And in the twenty-first century, comics has been at the center of heated global free-speech debates, which remain among the defining issues of our time, particularly as they map onto cultural and religious difference, starting with the 2005 publication in the Danish newspaper *Jyllands-Posten* of twelve cartoons of Muhammad, which led to worldwide protests, riots, and deaths in the outraged reaction to the violation of p. 825 the ↳ proscription against depicting the prophet. When the French satire magazine *Charlie Hebdo* reprinted the provocative cartoons in 2006, the Grand Mosque of Paris and the Union of French Islamic Organizations charged executive editor Philippe Val—under French hate-speech laws—with inciting hatred against Muslims.[10] Val, who faced a jail sentence in addition to a fine, was cleared in a two-day trial in 2007. In 2011, after publishing another image of Muhammad, on its cover, *Charlie Hebdo*'s offices were fire-bombed; in 2015, armed terrorists killed twelve people and wounded eleven others at the *Charlie Hebdo* offices, and later more across Paris. The massacre of January 2015 launched many passionate and globally significant debates about comics and the role of free speech.[11] These major events show how legal investigations have shaped comics, and how comics itself shapes debates about law, free speech, and even terrorism.

Even cartoonist and media theorist Scott McCloud's oft-cited example of how comics form functions—how comics presents causality—is about crime. In his foundational *Understanding Comics*, a study of comics theory itself produced in comics form, McCloud evocatively titles an explanatory chapter on comics grammar, "Blood in the Gutter." In a two-panel sequence (see Figure 45.1), he demonstrates how the space between panels, called the "gutter," works in comics. In the first frame, two men are pictured: one man chases another with an axe, declaring, "Now you die!!" The other man, in the foreground, holds his hands up and yells "No! No!" The following panel, across the space of gutter, offers a nighttime cityscape, with the sound *EEYAA!!* floating over buildings and across the sky. "I may have drawn an axe being raised in this example," McCloud writes, "but I'm not the one who let it drop or decided how hard the blow, or who screamed, or why. That, dear reader, was your special crime, each of you committing it in your own style."[12] The classic demonstration of the active participation comics grammar solicits from its readers in creating causal meaning (itself an established activity of the legal) is steeped in (macabre) crime.

Figure 45.1


NOW YOU DIE!!
NO! NO!
EEYAA!!
SEE THAT SPACE BETWEEN THE PANELS? THAT'S WHAT COMICS AFICIONADOS HAVE NAMED "THE GUTTER."
AND DESPITE ITS UNCEREMONIOUS TITLE, THE GUTTER PLAYS HOST TO MUCH OF THE MAGIC AND MYSTERY THAT ARE AT THE VERY HEART OF COMICS!

Scott McCloud, panels from *Understanding Comics: The Invisible Art* (Harper, 1993), 66.

Numerous trials and government reports have also been featured in comics—including the first *Charlie
Hebdo* trial in 2007, in a work by acclaimed cartoonist Joann Sfar: his Charlie trial “carnets,” titled *Greffier* (a
“Greffier” is a clerk to a legislature or court). More recently, Catherine Meurisse, the longtime *Charlie Hebdo*
editorial cartoonist, published *La Légèreté* (“Lightness”), about the aftermath of the January 2015 murders
p. 826 (upset about a breakup, she arrived late to work that day, missing the killing spree). ↳ There have also been
a series of comics adaptations of government reports, most notably *The 9/11 Report: A Graphic Adaptation* and
The Torture Report: A Graphic Adaptation, based on the 2014 report submitted by the Senate Select Committee
on Intelligence, about the torture of suspects in American custody post-9/11.[13] Comics about the terrorist
attack of 9/11—which includes work that probes the status of the attack as a crime, or an act of war—are
numerous enough to constitute a subgenre.

p. 827 There is also a rich tradition of comics about the experience and structure of war that engage explicitly with juridical tropes and with the order of international law (comics that bear witness to war and disaster, spanning centuries, are the subject of my own book *Disaster Drawn: Visual Witness, Comics, and Documentary Form*). Today, then, we see comics on the present war in Syria, and a whole new growing subset of comics on the experience of refugees (the *New York Times*, in a move indicative of this phenomenon, began running “Welcome to the New World,” a reported comic strip series running in the Sunday Opinion section, in 2017; it follows a real-life Syrian family’s immigration to America and won a Pulitzer Prize in 2018).[14] Across global locations, some of the most famous and celebrated recent graphic narratives also pivot on issues of the law. We see this, for instance, in Marjane Satrapi’s international bestseller *Persepolis* (originally published serially in France from 2000 to 2003), a graphic memoir of the author’s youth in Tehran. In the last chapter the protagonist Marjane, a young woman in her twenties, cites the unequal legal authority of women's witness in Iran, in which women's testimony counts for half of a man's testimony, as one of the reasons she must leave the country: her testimony counts for less than a man's. "Here, all the laws are on their side!" she complains to a friend, five pages before the book concludes with her boarding a plane for France. "If a guy kills ten women in the presence of fifteen others, no one can condemn him because in a murder case, we women, we can't even testify!"[15] The English cartoonist Una's recent book *Becoming Unbecoming* explores the inept police investigation of the serial killing of prostitutes in the late 1970s in Northern England by the so-called Yorkshire Ripper, again revealing how the voices of women—in this case, sexualized and therefore marginalized women—are devalued in the legal process. And the colossally successful graphic memoir *The Arab of the Future 2: A Childhood in the Middle East, 1984–1985* (first published in English in 2016), by the French-Syrian cartoonist Riad Sattouf—a former *Charlie Hebdo* contributor—presents the unexpected honor killing of Riad's cousin Leila as its defining drama, an event whose status as a crime is disputed in the family, thus staging cultural difference through distinct applications of law and justice.

45.1 Comics, Human Rights, and the Juridical

But for the purposes of considering comics from the interdisciplinary angle of law and humanities I am chiefly interested in the work of Malta-born cartoonist Joe Sacco, and how it engages—or doesn't engage— p. 828 the area of law known as human rights.[16] Sacco, ↳ perhaps more than any other cartoonist, helps readers to see how comics form can reveal the law-driven focus on "rights" differently than in traditional accounts. Sacco is a practitioner of "comics journalism," a tradition and classification he has done the most of any contemporary cartoonist to innovate, develop, and popularize. The category of "comics journalism," growing steadily for at least the past twenty-five years, is closely associated with Sacco's groundbreaking comics reporting from the Balkans and the Middle East.

Sacco's work has been taken up by the extant studies on the intersection of comics and law, despite their general predilection for examining the superhero genre, and it has also, specifically, been consistently analyzed by those writing on human rights from a variety of disciplines, including law and literary studies. His comics often revolve around the presentation of testimony—for instance, testimony that bears witness to war crimes. But while some identify Sacco's work as driven by charting human rights violations, and others describe him as an *advocate* for human rights, Sacco's work is not invested in a statutory conception of rights, or, for that matter, in lobbying for justice.[17] Instead, Sacco's work is invested in a *narrative* elaboration of witnessing, which unfolds conflicts and interpretations, and probes their particular human, material effects through soliciting testimony and communicating its dialogical contours.

Sacco was born in Malta in 1960 and lived in Australia before emigrating with his family to the United States, where he trained in journalism at the University of Oregon. In the early 1990s, the publication of his comic book *Palestine*, which examines the context of Palestine's First Intifada, and was released serially by independent publisher Fantagraphics, changed political and aesthetic cultures of expression. With no precedent, it altered how daily life in Palestine could be represented in the West, and it altered the horizon of comics and its purview, extending it to reporting from global conflict zones.[18]

Palestine went on to win the American Book Award and was collected into a book volume with an Introduction by Edward Said. *Palestine* features serious, on-the-ground reporting examining structural inequities, riots, deaths, and everyday life, including in refugee camps. It does this, crucially, without eschewing comic book conventions, as seen in its large, colorful block-letter title "PALESTINE" splashed across the top of each cover; its intermittently exaggerated, underground-inflected visual style, which alternates with meticulous, mimetic rendering; and its self-reflexive, even edgy tone and content, which p. 829 feature, as in the tradition of New Journalism, the reporter as a protagonist. ↳ Sacco spent two months in

Palestine and Israel, interviewing about a hundred people on both sides of the conflict. He went on to produce his major comics works *Safe Area Gorazde: The War in Eastern Bosnia 1992–1995* (2000); *The Fixer: A Story from Sarajevo* (2003); and *Footnotes in Gaza* (2009), all reported works of what Sacco calls “slow journalism,” focused on the details of lived life during wartime that get elided by the fast-moving, even hyperactive mainstream news cycle (and encapsulating history books). The Sacco canon also includes *Journalism* (2012), a collection of his short-form reporting in venues like *Time* and *Harper’s*—the first piece, “The War Crimes Trials,” takes us to The Hague for the International Criminal Tribunal for the Former Yugoslavia (ICTY); *Days of Destruction, Days of Revolt* (2012), a collaborative work with journalist Chris Hedges about poverty across America; and *The Great War* (2013), a twenty-four-foot accordion foldout book, described as an illustrated panorama, of the first day of the Battle of the Somme.

Sacco’s four major works—two each on the Israel-Palestine conflict and the Yugoslav War—share a structure built around the showcasing of testimony. This testimony comes from civilians and soldiers alike, sometimes on different sides of a political conflict or particular issue; they are all people whom Sacco interviews, face to face, about their experiences, which are often profoundly violent, and often steeped in drastic suffering, including suffering inflicted by genocidal actors. A large number of the people whom Sacco interviews in *Footnotes in Gaza* are survivors of two massacres of Palestinians that occurred in November 1956 in Palestine in the wake of the Suez Canal crisis; Sacco aimed to track down as many living survivors of the events, which took place in Khan Younis and Rafah, as he could. These stories—involving unlikely experiences like surviving being lined up against a wall and shot in multiple rounds by soldiers with machine guns on tripods—are harrowing and replete with physical as well as psychic extremity.

In the early part of his career, Sacco contemplated illustrating extant case studies of human rights abuses for a legalistic-style book. But he ultimately developed comics, which have become his signature, in which the central feature is his own first-hand solicitation of testimony. The word-and-image hybridity of the medium allows him to present a dual track: he presents the exact words of people’s testimony, as they bear witness to both ordinary and extraordinary events during conflicts and wartime—and he draws this testimony to share space on the page with and alongside the testimonial speech, offering concrete images that particularize and embody the witnesses, and that materialize history for readers. The hybridity of comics form, its framed showing and telling that can easily present multiple interlocking temporalities, also gives Sacco room to present the scene of enunciation—to display, through images, how the situation of testimony is interlocutionary, to show the circumstances under which speech is being produced.

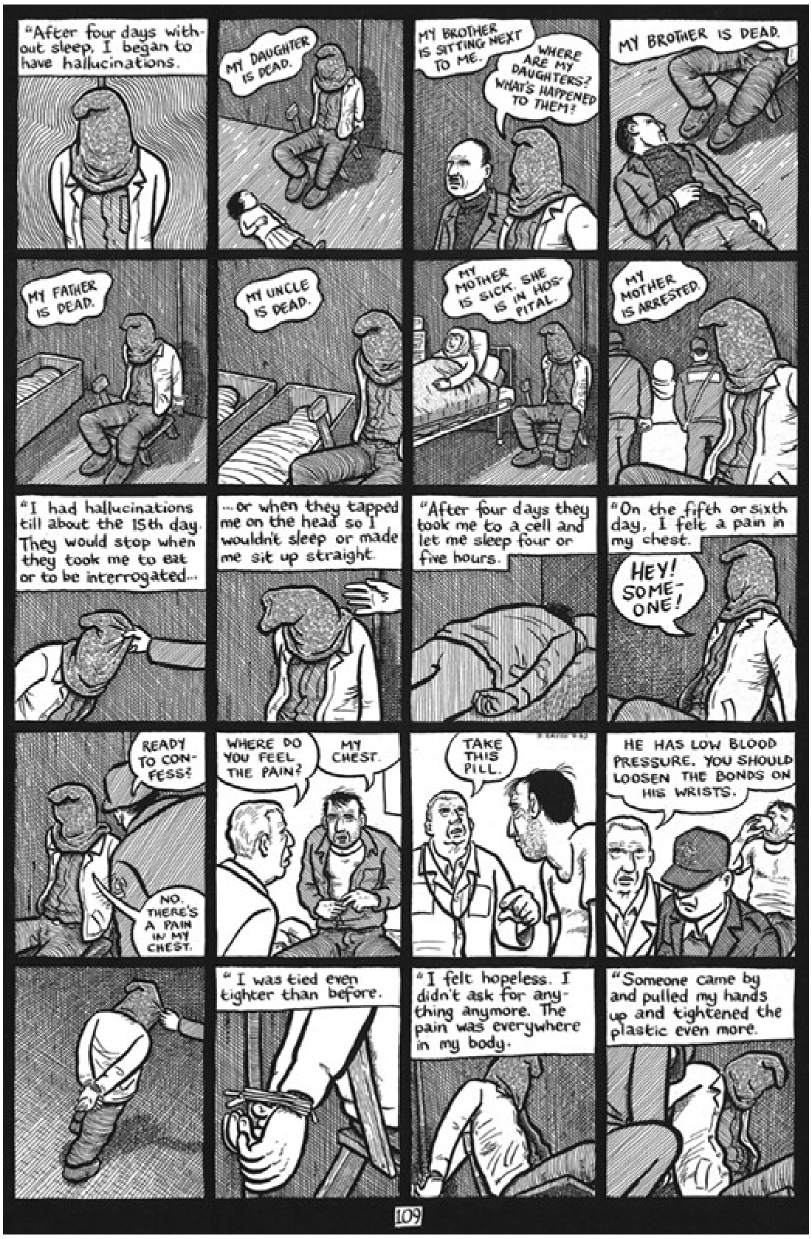
Comics can address itself in many powerful ways to the interdisciplinary concerns of human rights, which include how human rights claims are represented, and how they communicate and circulate; who is legible within or addressed by the language of rights; and how personal narratives, to use Marjorie Agosín’s phrase, p. 830 “are in dialogue with the ↳ historical.”[19] The attention to form that comics brings to the table is vital to understanding why graphic reporting like Sacco’s has had such a powerful impact among readers. In its conspicuous formalism, Sacco’s work demonstrates how apposite comics can be for considering the expression of human rights, but also how necessary the consideration of form is across the board, particularly in the arena of identifying rights. “We cannot talk about human rights without talking about the forms in which we talk about human rights,” Joseph Slaughter and Sophia McClennen insist, pointing out that “from a formalist perspective, legal documents are just one among many forms in which human rights discourses circulate and in which human rights claims are articulated.”[20] As James Dawes argues in “Human Rights Formalism,” form is key to thinking what “human rights” is and does; he avows the “fit between deeply contextualized global or regional human rights study and careful attention to aesthetic form” in the human rights approach to literature and culture, or the inverse: the literary and cultural approach to human rights.[21] Through what I have been calling comics’ grammar, or its syntax, the form offers an avenue to consider human rights that is both powerfully expressive and also avoids—or engages head-on—many of pitfalls of what has widely been identified as the normativity of human rights, which leads to its political banalization.[22] Comics accomplishes this through its conspicuous framing, and its capacious approach to time.

Comics works offer hand-drawn frames that enclose graphic content and that exist juxtaposed on the page. Conventionally, each frame represents a moment in time, and the reader projects meaning in the movement from frame to frame. Frames, in other words, spatially divide and mark time on the page. They can vary size and shape; Art Spiegelman identifies the "architectonic rigor" of the comics page, which establishes rhythms of reading—and rhythms of knowing and unknowing—through the variability of this fundamental narrative unit. One sees this, for instance, in a key chapter of *Palestine*, " 'Moderate Pressure' Part 2." This chapter focuses on the testimony of Ghassan, a Palestinian taken from his East Jerusalem home in the middle of the night, told he was "suspected of belonging to an illegal organization," and brought into Israeli police custody.[23]

" 'Moderate Pressure' Part 2" begins with a splash panel revealing Sacco in Ghassan's living room, with him and his children, examining the marks on Ghassan's back with a notebook in hand. It quickly flashes back, p. 831 in the next page, to Ghassan's harrowing time ↳ in custody. Through testimony—both narrated by Ghassan and visualized in drawing by Sacco—*Palestine* captures what a camera could not: an intimate scene of torture. (One reviewer called this episode "the most realistic account of imprisonment and torture I have ever read.")[24] Over eight pages, set against a black background, Sacco reveals Ghassan's experience in custody.

The first page offers, in rows of three, a grid of nine same-sized frames, or panels—a composition the cartoonist Ivan Brunetti names a "democratic" composition, with weight equally distributed.[25] On this page, Ghassan, with a sack placed over his head, is tied in a stress position on a chair for hours on end. The subsequent pages increase the number of panels on the page, indicating the shrinking of Ghassan's world in his cell. Sacco's comics narrative, registering the extremity of Ghassan's experience, offers smaller and smaller panels as the days go by, emphasizing his tight containment and declining hope. The narrative shifts from twelve panels a page to sixteen to twenty, as Ghassan remains hooded and placed into distinct stress positions; he's beaten, denied sleep, and begins to hallucinate, while still hooded, the appearance of bodies in his cell ("my daughter is dead") (see Figure 45.2). On the nineteenth day Ghassan is taken to a court appearance and released by a judge; the last page of the chapter registers his sudden freedom, his ability to exist in open space, in one large panel that occupies the entire half of a page, as Ghassan enters a car and drives away into the city. Comics not only depicts content but further textualizes the context (to invoke Shoshana Felman's formulation), asking readers to encounter a page that itself performs the movement of imprisonment and release through its conspicuous use of frames.[26]

Figure 45.2


"After four days without sleep, I began to have hallucinations.
MY DAUGHTER IS DEAD.
MY BROTHER IS SITTING NEXT TO ME.
WHERE ARE MY DAUGHTERS? WHAT'S HAPPENED TO THEM?
MY BROTHER IS DEAD.
MY FATHER IS DEAD.
MY UNCLE IS DEAD.
MY MOTHER IS SICK. SHE IS IN HOSPITAL.
MY MOTHER IS ARRESTED.
"I had hallucinations till about the 15th day. They would stop when they took me to eat or to be interrogated...
...or when they tapped me on the head so I wouldn't sleep or made me sit up straight.
"After four days they took me to a cell and let me sleep four or five hours.
"On the fifth or sixth day, I felt a pain in my chest.
HEY! SOMEONE!
READY TO CONFESS?
NO. THERE'S A PAIN IN MY CHEST.
WHERE DO YOU FEEL THE PAIN?
MY CHEST.
TAKE THIS PILL.
HE HAS LOW BLOOD PRESSURE. YOU SHOULD LOOSEN THE BONDS ON HIS WRISTS.
" I was tied even tighter than before.
"I felt hopeless. I didn't ask for anything anymore. The pain was everywhere in my body.
"Someone came by and pulled my hands up and tightened the plastic even more.
109

Joe Sacco, page from *Palestine* (Seattle, WA: Fantagraphics, 2001), 109.

In other words, Sacco's chapter is *about* the dispensation of the law—custody, charges, interrogation, court, judges—but it is also enacting something on a formal level that registers the rhythms, however horrible, of legal (or dubiously legal) practice on the ground. Its concern with "law," with "rights," exists on a denotative level and, importantly, on a formal level. Luis Eslava, in an essay on Sacco's *The Great War* whose claims reverberate throughout Sacco's oeuvre, observes that what makes the book "a unique artefact from the perspective of international law and international legal history … [is] Sacco's acute awareness of the relationship between structures of authority and materiality."[27] *The Great War,* he writes, "makes us aware of the materiality that has always been an intrinsic part of the history of the international legal order by the power of its illustrations and, importantly, by its format."[28]

p. 832

45.2

p. 833 ↳

Frames and Temporality

Comics’ hand-drawn frames, boxes of time sitting next to each other on the page, carry in their open artificiality an awareness of their own constructedness, even in work that operates, as Sacco’s firmly does, in the realm of accuracy and reporting. They are always self-consciously both literal and conceptual frames. This self-reflexivity, this constant marked-out awareness of what’s included and what’s excluded, is key in these globally violent political times in which widely proliferated and quickly disseminated visual culture, more than ever, helps to shape or to confirm political dispositions and subjectivities. As Judith Butler points out in “Photography, War, Outrage” (in a discussion of Susan Sontag), in today’s war-drenched global political climate we need to “see ourselves seeing.”[29]

The constant conspicuous attention to framing that comics thematizes and instantiates generates a form of sight and recognition that is fundamentally doubled, or dialogic. In “Framing Human Rights,” which takes Sacco’s *Footnotes in Gaza* as its primary object, Rebecca Scherr outlines the comics frame’s productive dual perspective. But she specifically argues for this duality—which she connects to Marianne Hirsch’s understanding of comics’ “biocularity” that encompasses and communicates contradictions—in the context of the human rights enterprise, which ethically demands awareness of its profound contradictions, its aspirations, and its limitations.[30] And beyond the duality of the frame, comics is motored at its most basic syntactic level by a further major, constitutive disjunct, that of word and image. In comics the words and images each move the narrative forward, nonsynchronously, in different ways that together imply narrative meaning. Comics, then, calls readers’ attention to the virtues of and also the friction between verbal and visual discourse—it underscores how trauma and violence break the boundaries of form; highlights what counts as evidence; and allows for multivalence. Its word and image form also suggests a constant back and forth of *reading* and *looking* for meaning. Comics encodes a media ethics, an awareness of the ontologies of different media, in its very hybrid form, in which the connection between word and image is suggestively proposed and questioned in its narrative procedure.[31]

Perhaps most strikingly, the treatment of time proposed by comics—its jagged, juxtaposed, compressed, p. 834 contracted, and/or overlapped timespaces—is a feature that ↳ allows for productive intercontextual richness to emerge in human rights depictions, a multivalent representational mode that can reveal different embedded contexts and registers.[32] “In order to achieve legibility in rights discourse,” Belinda Walzer argues, “the rights claim must be legible within a normative discourse and is thus often stripped of not only the specific context of its politico-temporal moment, but also the specificity and potential power of its claim.”[33] Comics form, with its capacious grammar, can work against this normalizing, linear temporality implied by the very category of “human rights law” (abuse; claim; redress). In *Understanding Comics*, Scott McCloud reminds us that the conventions of comics would seem to dictate that each panel is a moment—and then he says time in comics is “infinitely weirder than that.”[34]

The *weirdness* of time in comics is part of the medium’s force as a storytelling form. But it also, as Walzer and Rose Brister argue in an essay on Sacco’s *Footnotes in Gaza*, registers an “upset of spatial and temporal progress” demonstrating how the form calls “for a more nuanced understanding of rhetorical time involved in the depiction of rights violations.”[35] In comics two different temporalities can inhabit one marked-out space, as when the legs of Jewish girls hanged in Auschwitz in 1942 dangle from the treetops lining a Catskills road in 1979 in a single panel of Spiegelman’s *Maus.*[36] In comics time can be “stopped”—represented time, that is. Time can be deliberately confused, as in Spiegelman’s *In the Shadow of No Towers*, which presents different directions of reading, vertical as well as horizontal, and comics embedded within comics, obfuscating causality (Spiegelman has called this comics’ “symphonic” effect, and it is tied to the trauma induced by his 9/11 experience.) In comics time often moves backward across the space of the gutter—which can also indicate seconds, weeks, years, or, as above, no movement of time at all. (The gutter itself, as a blank space of projection, is not strictly quantifiable, as the time happens in the reader’s mind, as with Henri Bergson’s *durée*.) Sacco’s comics often use flashbacks, shifting from the scene of testimonial enunciation to the visualization of recounted events in the past, but Sacco’s techniques also suggest the blending or interlacing of time, as when he presents a body in the past actually physically overlapping with p. 835 that same body, years later—making the illocutionary, testifying self and the past ↳ self-contiguous within one graphic space. Bodies and temporalities are proliferated, unstable, loosened from a temporal anchor.

In *Footnotes in Gaza* this temporal overlay or palimpsest suggests, as Sacco puts it powerfully in the Foreword, “the remorseless continuum” of history. *Footnotes in Gaza* interweaves its focus on the 1956 massacres of Palestinians with the present tense of creating the book, in 2003, including home demolitions witnessed by Sacco. “As someone in Gaza told me,” Sacco writes in the Foreword, “ ‘Events are continuous.’ ”[37] Through its graphic form, the book demonstrates what one Palestinian man—the son of a survivor of the massacre in Rafah—grumbles to Sacco: “Every day here is ’56!”

Footnotes’s deliberate temporal entanglement, its non-linearity, and its constant figuration of the past in the present, expressed verbally and graphically, destabilize narratives of progress around “rights” and enable a view of communities stripped of rights that reveals material effects contextually. In Walzer’s view, attention to the form of comics reveals the potential in *kairotic*—or, rather, *akairotic*—analytical reading practices (*kairos* is the ancient Greek word that means the opportune or right moment in time, as opposed to *chronos,* progressive time), which “[enjoins] the reader to account for the specific contexts of naming the violations of human rights.”[38] Comics’ weird temporalities can both present violations and also account, through the form’s simultaneity, temporal density, and layered spaces, for how their representation is produced. It can insist on the time of (the creation of) testimony, and the time of experience, in addition to the time frames created by the human rights law paradigm and apparatus (what some call the human rights regime).

And yet, while I agree that the capacities of comics time offer a productive avenue for thinking about both the aspirations and the critique of a human rights paradigm, I don’t feel, as Walzer and Rose Brister do, that Sacco’s comics are “advocating human rights,” or that they “stake claims for human rights in Palestine,” where he “begins his human rights work.”[39] Likewise, I don’t feel, as Jérémie Gilbert and David Keane do, that, at least in Sacco’s case, “graphic reporting is a means by which graphic novels can chart human rights violations and the mechanisms for their prevention.”[40] Sacco’s famous works on the Israel-Palestine conflict and the Yugoslav Wars very clearly depict legal matters: war crimes, for instance, and other violations of human rights. And as Walzer and Brister point out, in *Palestine*, there is an explicit engagement “with existing human rights discourses and agencies tasked with remediating basic human rights for Palestinians,” as Sacco depicts, for instance, his tour of the Jabalia refugee camp sponsored by the United Nations Relief and Works Agency for Palestinian Refugees (UNRWA).[41] This focus on UN agencies continues throughout Sacco’s major works on the Middle East and the Balkans. But Sacco’s works are not didactic or prescriptive, unlike others discussed at the beginning of this chapter.

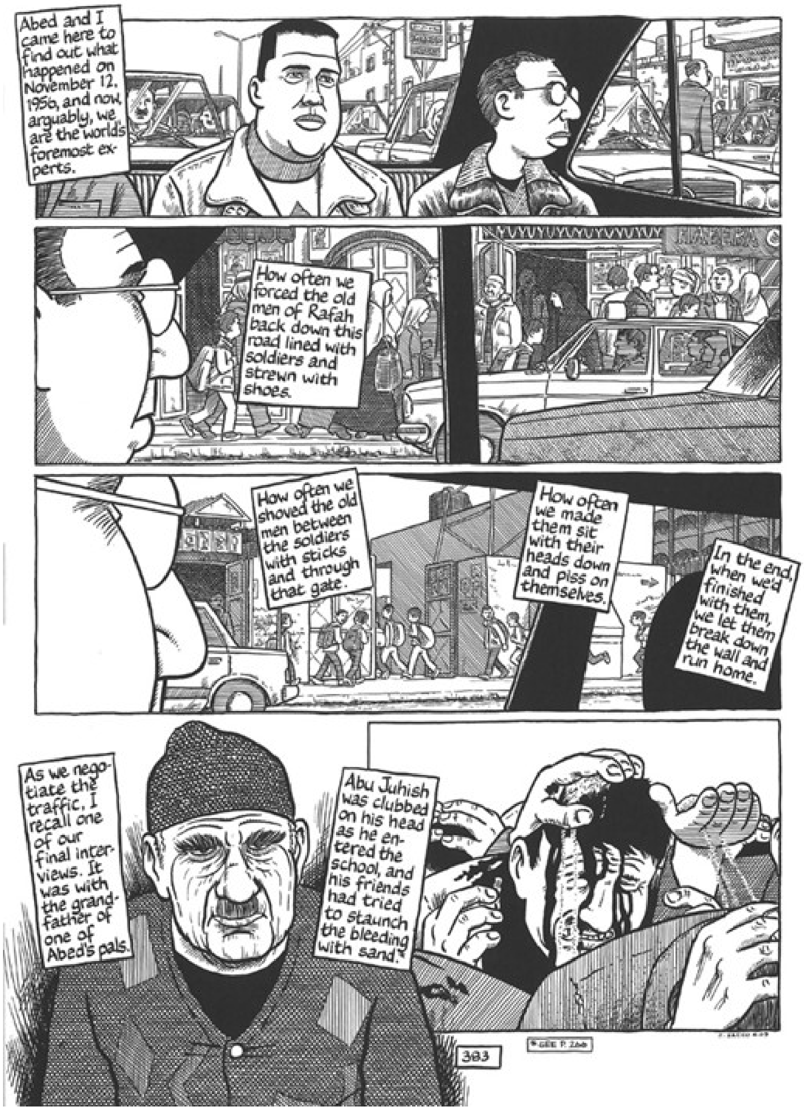
p. 836

45.3 Haunting and Imaginability

Although its attention to the globally disenfranchised may seem to rhyme with current human rights discourse, Sacco's work is not invested in a statutory conception of rights, or, for that matter, as I have noted, in lobbying for justice. Sacco calls his work, as I pointed out earlier, "slow journalism"; it takes him years and years to draw his meticulously researched, visually detailed, and rigorously composed and designed books. *Footnotes in Gaza*, for instance, took him seven years to complete, a timeline that indicates his project isn't steeped in the timeliness of activism, or in advocating for material redress of abuses and violations happening in immediate time frames. Sacco signs and dates each of his pages, which paradoxically underlines how as units (of testimony, of witnessing) they function as official signed documents, but also how as aesthetic units they are works of art bearing the conspicuous stamp of the auteurist creator. Sacco's work, as steeped in the legal as it is, operates in an extrajuridical realm; it is not trying to intervene in contemporary arenas and administrations of law, despite reporting on the deficiencies of law's organizing bodies. The comics-form testimony, however, to borrow language from Leigh Gilmore, can be understood, particularly in its public availability and dissemination, as, in collaboration with Sacco, for its witnesses, "a forum of judgment in which the subject may achieve a control over her story she would not hold in court."[42]

However grieved Sacco the person is about the violence and conditions he encounters, Sacco's comics are not about seeking to enact the juridical, the statutory, but are rather about revealing *haunting*.[43] In Sacco's work one registers a kind of haunting by the other that does not end, that cannot be accounted for by rights talk, or contained by the law. We see this throughout his work but particularly forcefully at the end of *Footnotes in Gaza*, which concludes with Abu Juhish, an old man who is a survivor of the massacre that took place in a Rafah schoolyard in 1956, and the grandfather of a friend of Sacco's translator Abed. We are introduced to Abu Juhish on a page in which Sacco meditates on his own practices of interviewing, which forced the memories of a trauma to be relived for the witnesses. After several tightly contained panels, which offer the double-framed containment of depicting Sacco in the small space of taxi, the page seems to break open; its horizontal panels are interrupted by the physical presence of Abu Juhish seeming to rise up
p. 837 from the bottom edge of the page, the texture of his face, with its dramatic ↳ deep-set vertical lines, rendered precisely, along with the texture of his sweater and hat, staring out at readers. One is reminded here—as throughout Sacco's oeuvre, with its detailed attention to faces—of Emmanuel Levinas's figuration of the ground of the ethical encounter as an encounter with the human face that "calls upon" a person.[44] Immediately to the right we see Abu Juhish in 1956, directly after he has sustained major head injuries from the club of an Israeli soldier, gripping his head as his friends try to staunch the head wound with sand. Unbordered, his face, gazing at us, asks us to encounter his experience and perspective; *Footnotes in Gaza*, then, in fact does just that, switching the perspective to offer, as its conclusion, four complete pages, before and after the clubbing, from Abu Juhish's optical point of view (see Figure 45.3).

Figure 45.3


Abed and I came here to find out what happened on November 12, 1956, and now, arguably, we are the world's foremost experts.
How often we forced the old men of Rafah back down this road lined with soldiers and strewn with shoes.
How often we shoved the old men between the soldiers with sticks and through that gate.
How often we made them sit with their heads down and piss on themselves.
In the end, when we'd finished with them, we let them break down the wall and run home.
As we negotiate the traffic, I recall one of our final interviews. It was with the grandfather of one of Abed's pals.
Abu Juhish was clubbed on his head as he entered the school, and his friends had tried to staunch the bleeding with sand.*
383
*SEE P. 266

Joe Sacco, page from *Footnotes in Gaza* (New York: Metropolitan, 2009), 383.

Sacco's comics center on particularized others. His drawing seeks to render the other concrete as opposed to generalized—a detailed face, and as well as a voice, for himself and for readers to encounter and contemplate. "The way we act toward 'others' is shaped by the way we imagine others," Elaine Scarry points out in "The Difficulty of Imagining Other Persons," an essay that discusses the imaginative *labor*, as she puts it, of knowing others.[45] The visual shape of comics inclines toward what Scarry terms "picturability," particularly in drawing's ability to concretize the past. Sacco told me in an interview, "There are very few photographs—and we know them very well—that capture an exact moment, and that image is always with us. The guy getting killed in the Spanish Civil War, the Vietcong suspect getting shot by the Saigon police chief. ... Now, when you draw, you can always capture that moment. You can always have that exact, precise moment when someone's got the club raised, when someone's going down. I realize now there's a lot of power in that. It's a bit scary in a way, because you're capturing moments like that constantly from panel to panel. You have to put yourself in everyone's shoes that you draw, whether it's a soldier or a civilian. You have to think about what it's like: What are they thinking? What are they feeling?"[46] Sacco's comics pivot on the project of making the other, as Scarry puts it, "imaginable" or "picturable"—concretized, material, specified through the labor of line and shading.[47] Sacco's dense, virtuosic style is an ethical attempt to represent people ignored in the global arena (who in his work are often, although not exclusively, Muslim). In this way—demonstrating how he is, and how he asks readers to be, through his careful documentation—haunted by the specified war-torn people he encounters, Sacco's work is much more about *ideation* than advocacy. The focus on imaginability and ideation is a more literary enterprise than advocating for a specific cause or claim.[48]

↳

What are comics evidence for, then? What do these works make legible for understanding how law and humanities discourses speak to each other? Comics like Sacco's model, or remodel, our thinking about what the law does, and what it doesn't do—about its material effect, or lack of material effects. And it does this not only through its themes but also, crucially, through its form. Sacco ends *Footnotes in Gaza* with a scene that stages his own failure to imagine the fear of others as a springboard for his efforts to imagine the experience of another. "The problem of justice is given a face and a voice," Wai Chee Dimock writes of literature in *Residues of Justice*, "a density of feature that plays havoc with any uniform scale of measurement and brings to every act of judicial weighing the shadow of an unweighable residue." Overlapping with both philosophy and law, but reducible to neither, "justice as a literary dream (and often as a literary nightmare) remains a live issue not for what it manages to put to rest, but for what it fails to."[49] Comics can model the space of this failure, this incommensurability, nonetheless asking readers, outside the order of the compulsory, to encounter the material evidence of lived lives.

Further Reading

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1 Lynn Emmert, “Life Drawing: An Interview with Alison Bechdel,” *The Comics Journal* 282 (April 2007), 34–52, 49.

2 Brief of Bob Kohn as Amicus Curiae, U.S. v. Apple, Inc., Civ. Action No. 12-CV-2826 (DLC), S.D.N.Y., Sept. 4, 2012.

3 See Kate Vitasek, “Comic Contracts: A Novel Approach to Contract Clarity and Accessibility,” *Forbes*, Feb. 14, 2017.

4 Camilla Andersen, “Comic Contracts and Other Ways to Make the Law Understandable,” *The Conversation*, Jan. 19, 2018. For conference information, see http://www.law.uwa.edu.au/comic-book-contracts-conference-2017.

5 R. Sikoryak, *Terms and Conditions: The Graphic Novel* (Montreal: Drawn & Quarterly, 2017).

6 See Lawtoons, http://www.lawtoons.in/why-lawtoons/.

7 Nickie D. Phillips and Staci Strobl, “When (Super)heroes Kill: Vigilantism and Deathworthiness in *Justice League, Red Team*, and the Christopher Dorner Killing Spree,” in *Graphic Justice, Intersections of Comics and the Law*, ed. Thomas Giddens (Abingdon, U.K.: Routledge, 2015), 109–129, 109.

8 On human rights law as fraught, one useful recent framing of debates is Elizabeth Anker, “Teaching the Legal Imperialism Debate over Human Rights,” in *Teaching Human Rights in Literary and Cultural Studies*, ed. Alexandra Schultheis Moore and Elizabeth Swanson Goldberg (New York: MLA, 2015), 39–42, which begins with the assertion that “configured as ‘gifts from the West to the Rest,’ human rights, although they remain salutary in many contexts, have aims and ideals that are far from neutral or cost-free when imposed on postcolonial cultures and societies.” Ibid., 39. See also Elizabeth S. Anker, “Human Rights,” in this volume.

9 See Amy Kiste Nyberg, *Seal of Approval: The History of the Comics Code* (Jackson: University Press of Mississippi Press, 1998).

10 According to French newspaper *Le Monde*, Charlie Hebdo faced forty-eight trials since 1992. “Charlie Hebdo: 22 ans de procès en tous genres,” Jan. 8, 2015.

11 See, for instance, Joe Sacco, “On Satire,” *Guardian*, Jan. 9, 2015; Karl Sharro, “Charlie Hebdo and the Right to Be Offended,” *The Atlantic*, Jan. 10, 2015; Art Spiegelman and Tariq Ramadan on Democracy Now!, January 8, 2015. In the spring of 2015, writers including Michael Ondaatjie and Junot Díaz boycotted a gala sponsored by the international writers’ organization PEN and signed a letter denouncing PEN’s choice to give a freedom of expression award to Charlie Hebdo. Salman Rushdie, who spent years in hiding after the 1988 publication of his book *The Satanic Verses*, defended PEN vigorously: “If PEN as a free speech organization can’t defend and celebrate people who have been murdered for drawing pictures, then frankly the organization is not worth the name.” Jenny Schuessler, “Six PEN Members Decline Gala After Award for Charlie Hebdo,” *New York Times*, Apr. 26, 2015.

12 Scott McCloud, *Understanding Comics: The Invisible Art* (New York: Harper, 1993), 68.

13 *The 9/11 Report: A Graphic Adaptation* was followed by a work of graphic journalism (as opposed to an adaptation of a government document), by the same team, writer Sid Jacobson and artist Ernie Colón, titled *After 9/11: America’s War on Terror* (2001–).

14 Jake Halpern and Michael Sloan, “Welcome to the New World,” *New York Times*.

15 Marjane Satrapi, *Persepolis 2: The Story of a Return* (New York: Pantheon, 2004), 183. See also Hillary Chute, *Graphic Women: Life Narrative and Contemporary Comics* (New York: Columbia University Press), 165–166.

16 As Gilbert and Keane point out, “the term ‘human rights’ has many connotations but the term ‘human rights law’ is more readily delineated. It refers to the collection of international treatises and standards overseen by the UN, drawing its authority from the 1945 Charter of the United Nations, and articulated first as a global standard in the 1948 Universal Declaration of Human Rights. The contemporary contours of ‘human rights law’ are expressed in the mandate of the Office of the High Commissioner for Human Rights.” Jérémie Gilbert and David Keane, “Graphic Reporting: Human Rights Violations Through the Lens of Graphic Novels,” in *Graphic Justice: Intersections of Comics and the Law* (Abingdon, U.K.: Routledge, 2015), 236–254, 236.

17 Ibid., 239.

18 *Palestine* was published in nine issues from 1992 to 1995.

19 Marjorie Agosín, “Foreword,” *Teaching Human Rights in Literary and Cultural Studies*, ed. Alexandra Schultheis Moore and Elizabeth Swanson Goldberg (New York: MLA, 2015), i–xii, xii.

20 Joseph Slaughter and Sophia McClennen, “Human Rights and Literary Forms,” Special issue, *Comparative Literature Studies* 46, no. 1 (2009): 1–9, 11.

21 James Dawes, “Human Rights Formalism,” in *Teaching Human Rights in Literary and Cultural Studies*, ed. Alexandra Schultheis Moore and Elizabeth Swanson Goldberg (New York: MLA, 2015), 321–326, 322.

22 See, for instance, the classic study, Joseph R. Slaughter, *Human Rights, Inc.* (New York: Fordham University Press, 2007): “The banalization of human rights means that violations are often committed in the Orwellian name of human rights themselves, cloaked in the palliative rhetoric of humanitarian intervention, the chivalric defense of women and children, the liberalization of free markets” (ibid., 2).

23 Joe Sacco, *Palestine* (Seattle, WA: Fantagraphics, 2001), 103.

24 Dick Doughty, “Review: Palestine with Attitude,” *Journal of Palestine Studies* 27 (1998): 99–100.

25 See Ivan Brunetti, *Cartooning: Philosophy & Practice* (New Haven: Yale University Press, 2011).

26 See Shoshana Felman and Dori Laub, *Testimony* (New York: Routledge, 1992). Felman explains: “[T]he empirical content needs not just to be *known*, but to be *read.* … The basic and legitimate demand for *contextualization of the text* itself needs to be complemented, simultaneously, by the less familiar and yet necessary work of *textualization of the context*.” Ibid., xv (emphasis in original).

27 Luis Eslava, “The Materiality of International Law: Violence, History and Joe Sacco’s *The Great War*,” *London Review of International Law* 5 (2017): 49–86, 77.

28 Ibid., 80.

29 Judith Butler, “Photography, War, Outrage,” *PMLA* 120, no. 3 (2005): 822–827, 826. See also Judith Butler, *Frames of War* (London: Verso, 2009).

30 Rebecca Scherr, “Framing Human Rights: Comics Form and the Politics of Recognition in Joe Sacco’s *Footnotes in Gaza*,” *Textual Practice* 29 (2015): 111–131, 117. See also Marianne Hirsch, “Editor’s Column: Collateral Damage,” *PMLA* 119 (2004): 1209–1215.

31 Cultural anthropologist Allen Feldman maintains that “the critique of violence requires a media ethics … critique of the political presentation of violence as media.” *Archives of the Insensible: of War, Photopolitics, and Dead Memory* (Chicago:

University of Chicago Press, 2015), 235. See also Subha Mukherji's chapter, "Facing Justice: Evidence, Legibility, and Pensiveness in the Early Modern Imagination," in this volume.

32 In her influential *Spectacular Rhetorics*, Wendy Hesford explains, "Intercontextuality is a key element of a rhetorical analytic that seeks to understand how arguments and images travel across cultural and national borders, and how symbols and symbolic practices are appropriated, translated, and historicized." Wendy Hesford, *Spectacular Rhetorics: Human Rights Visions, Recognitions, Feminisms* (Durham, NC: Duke University Press, 2011), 10.

33 Belinda Walzer, "The Right Time for Rhetoric: Normativity, *Kairos*, and Human Rights," in *The Routledge Companion to Literature and Human Rights*, ed. Sophia A. McClennen and Alexandra Schultheis Moore (Abingdon, U.K.: Routledge, 2016), 433–440, 438.

34 McCloud, *Understanding Comics*, 94. For a view of the importance of spacetime in law specifically, see Mariana Valverde's chapter, "Spacetime in/and Law," in this volume.

35 Belinda Walzer and Rose Brister, "*Kairos* and Comics: Reading Human Rights Intercontextually in Joe Sacco's Graphic Narratives," *College Literature* 40, no. 3 (2013): 138–155, 142, 144.

36 Art Spiegelman, *The Complete Maus* (New York: Pantheon, 2011). For further discussion of this, see Hillary Chute, *Why Comics? From Underground to Everywhere* (New York: Harper, 2011), 50–51.

37 Joe Sacco, *Footnotes in Gaza* (New York: Metropolitan, 2009), xi.

38 Ibid., 151.

39 Ibid., 139.

40 Ibid., 252.

41 Ibid., 139–140.

42 Leigh Gilmore, "Jurisdictions: *I, Rigoberta Menchú, The Kiss*, and Scandalous Self-Representation in the Age of Memoir and Trauma," *Signs: Journal of Women in Culture and Society* 28, no. 2 (2003): 695–718, 696. Gilmore, in a different but not unrelated context, writes specifically about the forms of memoir and *testimonio*. For comics autobiography as an "alternative jurisdiction," following Gilmore, see Chute, *Graphic Women*, for the chapter on Phoebe Gloeckner, a cartoonist who was statutorily raped as a minor and went on to create several books about it as an adult, opting instead of legal redress for a public forum in which to testify.

43 Gordon shows us the apposite view: "[B]eing haunted draws us affectively, sometimes against our will and always a bit magically, into the structure of feeling of a reality we come to experience, not as cold knowledge, but as transformative recognition." Avery Gordon, *Ghostly Matters: Haunting and the Sociological Imagination* (Minneapolis: University of Minnesota Press, 2008), 8. As Sontag declares, "let the atrocious images haunt us." Susan Sontag, *Regarding the Pain of Others* (New York: Picador, 2003), 115.

44 See *Totality and Infinity*, trans. Alphonso Lingis (Pittsburgh, PA: Duquesne University Press, 1969), and *Ethics and Infinity*, trans. Richard A. Cohen (Pittsburgh, PA: Duquesne University Press, 1985). In the latter, in the section "The Face," Levinas suggests that the face is not just an index of character, but rather is "meaning all by itself. … It is uncontainable" (86–87).

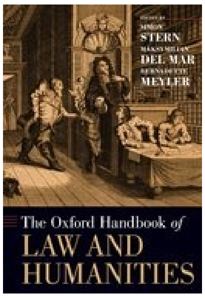
45 Elaine Scarry, "The Difficulty of Imagining Other Persons," in *The Handbook of Interethnic Coexistence* (New York: Continuum, 1998), 40–62.

46 Hillary L. Chute, "Joe Sacco," in *Outside the Box: Interviews with Contemporary Cartoonists* (Chicago: University of Chicago Press, 2014), 139–154, 146.

47 Ibid.

48 However, Sacco is motivated by trying to understand questions that dovetail with the legal. One of his forthcoming book projects is an examination of the early civilization of Mesopotamia, seeking to answer the question, "How does the state get a person to kill another person?" See Laura Sneddon, "Stripped—Joe Sacco: Conflict Comes in a Lot of Guises," *The Beat*, Aug. 15, 2013.

49 Wai Chee Dimock, *Residues of Justice: Literature, Law, Philosophy* (Berkeley: University of California Press, 1996), 10.



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CHAPTER

37 Responsa

Ari Z. Bryen

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Abstract

Responsa—answers to discrete legal questions—are one of the oldest juristic technologies. Though an ancient mode of responding to legal uncertainty, responsa were also highly dependent upon the authority of the jurist offering them. This posed a tension between juristic authority and other modes of authority, and between the learned opinion of a trustworthy man and the demands of reason. Although responsa are found in many premodern legal cultures (including Jewish, Muslim, and Hindu traditions), this chapter focuses on the experience of Roman jurists. Starting from the earliest period in which responsa were given by jurists who were also priests, this chapter traces their history through the Roman late Republic and Empire (*c.* 50 BCE–*c.* 250 AD) as they increasingly became a written genre crafted by jurists whose position was at times tenuous.

Keywords: responsa, jurists, ancient law, orality, jurisprudence, Roman law

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37.1 Cascellius and the Pine Cone

IN the course of his learned collection, the *Saturnalia*, composed in the fifth century AD, Macrobius Ambrosius Theodosius recounted a story of a jurist renowned for his wit. The story is set in the rough-and-tumble world of late Republican Roman politics, shortly before the advent of one-man rule toward the end of the first century BC[1]:

> The legal expert (*iuris consultus*) Cascellius was generally considered a man of marvelous wit and candor, though this jest gained particular notoriety: when the people stoned Vatinius while he was giving gladiatorial shows, he (Vatinius) got the aediles to issue a decree (*edicerent*) that only fruit was to be thrown in the arena; when someone happened to ask Cascellius at about the same time

> whether in his opinion a pine cone was a fruit, he said (*respondit*), "If a person is going to throw it at Vatinius, it's a fruit."

Vatinius would have been a character well known among Macrobius's equally learned peers, though he lived hundreds of years beforehand. Macrobius would have known of him not least through Cicero's orations, among them an invective, *Against Vatinius*. Macrobius makes him out to be wildly unpopular, but it is probably more accurate to say that he was divisive. A partisan of the populist politician Publius Clodius and of Julius Caesar, he was elected as tribune of the people in 59 BC, praetor in 55 BC, and finally reached the
p. 672 pinnacle of his career with his election to consul in 47 BC (a position in ↳ which he served only briefly).[2] He was, in other words, a modestly successful politician, but also one who provoked the anger of his detractors. Hence the stoning.

Cascellius is harder to pin down: none of his writing is preserved—in fact, there is no evidence that he wrote in the first place. Our only evidence for his thinking are three direct quotations (including the one above); some thirteen reported opinions, mostly having to do with inheritance; evidence of a procedural innovation; and the statement of a jurist of the second century AD that his works, if they ever existed, were unavailable. All that remained, said that jurist, was a book of *bon mots*—perhaps a collection that included responsa, but one cannot be certain. The jurist also adds the tantalizing detail that Cascellius was once elected quaestor (the lowest rank on the *cursus honorum*) but was later in life offered the consulship by the emperor Augustus. He refused it.[3] A hostile source adds that during the period of chaos following the death of Caesar (44 BC), Cascellius refused to craft any sort of legal document ratifying the "gifts" of the Triumviri (gifts, that is, of confiscated property). The result was to place all of their gifts outside the law (*extra omnem ordinem legum ponens*), such that the possession of such property could never ripen into full civil law ownership. This source adds that Cascellius was generally hostile to the new regime, and made his opinions known. His friends, worried for his safety, warned him to be quiet. He refused.[4]

This conflict between a modestly successful politician and a learned jurist can serve as a frame for what follows. Vatinius the politician, offended by the stoning, went to the aediles (the magistrates charged with protecting public welfare) and pressured them to add a clause to their edict (a document published annually, declaring what rules would govern market transactions and what rules were necessary for public safety). Vatinius, in other words, was powerful enough to force a change in the law. The result, however, was not immediate obedience but rather that people then went to a jurist—a private individual—for guidance in following the rule. Cascellius's response was taken, by his partisans at least, as the authoritative interpretation of how to put the law into action—or in this case, how best to avoid it. For Macrobius, this was fitting solution to the unpleasantness of Vatinius: he would continue to be pelted with hard objects.

Macrobius's vignette, though, does more than record a witticism; it evokes a more complex problem of political authority and its relation to law. As it turns out, Vatinius's change in the law was unconventional, even unusual. The normal way to change a rule in the Roman Republic was to pass legislation, which would be voted on by the people (some proportion of those very same people, no doubt, who had stoned Vatinius in
p. 673 the first place). Pressuring the aediles to alter their edict was more unusual—it was the tool ↳ of a sneaky politician, one who wished to subvert order more generally.[5] Vatinius, on this reading, was both a populist and unprincipled. Cascellius, however, was a conservative: though holding no formal office at that time, he had the power to shape the law by virtue of being recognized as an expert. Like great Romans of old, he brought structure to the civil order because he possessed *auctoritas*—that is, people recognized his excellence and deferred to him.[6] To bring this habitus to bear for the sake of punishing a man like Vatinius was satisfying to him and to his audience; that such a ruling was delivered in a pithy, witty, and urbane manner was a critical part of the performance, and more generally part of the way that jurists (among others) constructed their authority.

Cascellius will serve as something of a guide in what follows. In general my focus will be on the Roman experience of responsa, the culture that generated this particular sort of juristic discourse, and the relationship between this genre of jurisprudence and other forms of political authority. The focus, throughout, will be on the larger problem of juristic *auctoritas*, and the relationship between *auctoritas* and genre. The Roman contribution to this problem is enlightening in its own right, but perhaps even more so as an exemplary instance of a more common premodern legal concern or conundrum. Similar things, I think, could be said about the responsa of Talmudic rabbis, or even of Hindu Brahmins.[7] I point forward in time, toward the end of this chapter, to the role of responsa in other, later cultural and political formations.

37.2 The Origin and Context of Responsa

As the name indicates, a *responsum* is an answer to a specific (rather than abstract or open-ended) legal question: does X count as Y? can procedure A be used to rectify grievance B? what is the status of person C in circumstance D? The answers to such questions likely constitute the oldest genre of what might be termed "technical" or "mandarin" jurisprudence—responsa, that is, came before commentaries or maxims, handbooks or treatises. Starting in the Roman Republic, responsa were delivered by men like Cascellius—individuals who were recognized as being experts, whether or not they held, at that moment, a particular magistracy or position of formal authority (the term "jurist" is a misnomer if it is taken as referring in this formative period to a person's profession rather than a body of expertise that he possessed).[8]

p. 674 The beginning of such a practice is murky, and scholars must speculate as to its origins. Nonetheless, some broad outlines might be plausibly reconstructed. Jurisprudence likely originated in the context of religion, specifically, in the context of the colleges of priests responsible for the welfare of the Roman state and the peace between the city and its gods. According to one jurist, knowledge of civil law actions was originally restricted to the college of Pontiffs, something he claims was by design, so that the people at large could not litigate in whatever way they might wish (*ne populus prout vellet institueret*).[9] A later Roman jurist, but one highly aware of his traditions, similarly claimed a connection between the social roles of jurists and priests.[10] Legal knowledge—and, in particular, the authority to interpret law—was, according to such an account, a specialized branch of expertise. Religious knowledge was similarly conceived as a *scientia*, a mode of knowing, accompanied by a specialized literature.[11] At some distant point in Rome's past, giving an answer to a legal question and giving an answer to a religious question were likely one and the same.

This account is further supported by a marked similarity between the purported emphasis on formalism and correct performance in ritual matters and the emphasis on formalism in law.[12] As far as legal formalism goes, there does seem to have been a high degree of formalism in early Roman litigation.[13] Similarly, the law of testation remained characterized by such formalism well into the historical period.[14] The same might be said for the existence of complex and archaizing (if not necessarily archaic) rituals that accompanied the transfer of particular sorts of property.[15] But the argument need not hinge entirely upon the existence of formalism. It might suffice to remember that particular legal categories were important precisely because they entailed ritual obligations as well. Thus, determining who was an heir was not simply a determination of who was to inherit the property of the deceased but also who was to be responsible for the funeral rites due to an ancestor. Deciding where it was acceptable to place a tomb might hinge on determining the status of a particular piece of land, and vice versa.[16] It is therefore not surprising to find early that a number of early jurists were high priests (*pontifices*) of the Roman state or members of the college in charge of divination (*augures*), or that early juristic responsa might involve decisions about the appropriateness of animals for sacrifice or the interpretation of prodigies.[17] While over the course of the later Republic, religious and legal knowledge evolved into distinct bodies of expertise, they maintained p. 675 ↳ traces of their origins as ensuring the well-being of the Roman state.[18] (Indeed, priests of the Roman state continued to give responsa as well—perhaps most famously in the response given by the Haruspices, a group of Etruscan diviners, regarding a series of portents in 56 BC. For the purposes of what follows, however, I shall pass over this body of "religious" responsa, which poses its own challenges of reconstruction and interpretation.[19])

This body of legal knowledge and interpretive expertise (which together went under the heading of *ius*) was always in tension with the will of the people, expressed through statute (*lex*).[20] In other words, despite their eminence and claims to sacrality, jurists might be bound, or even overruled, by popular will—for in some strains of Roman constitutional thinking, the collected people always had a right to proclaim what was "true" in matters pertaining to the city, be they religious, legal, or constitutional. The story of Vatinius and Cascellius captures this dynamic, as do grave inscriptions from the city of Rome, with their threats "let evil intent and jurists be gone (*dolus mal(us) abesto et iuris consult(i)*)!"—a stern warning, using a linguistic form common to legislation (*abesto*—a third-person imperative), against violating the will of the deceased.[21] Yet it was only on rare occasions during the Republic that the two forms of social power came into conflict. In general, jurists of this period were averse to making rulings on statutes, aside from those of relative antiquity (such as the Twelve Tables or the *Lex Aquilia*, which concerned damages). This is perhaps not surprising, given the vicissitudes of late Republican lawmaking.[22] Tensions would emerge, however, during Rome's civil wars and beyond. A Cascellius might conspicuously refuse to find a legal way of confirming the ownership of confiscated property, for example. Regardless of the awkwardness this might provoke, a responsum was not a binding decision but merely advisory. It was nevertheless accorded great respect, even when other jurists might disagree with it.

37.3 Responsa and Reason

Cascellius may have cultivated a yet more conservative habitus than is immediately apparent. Though jurists of the far distant past may have offered responsa without simultaneously being engaged in writing, such an era was long since gone. Jurists of p. 676 ↳ Cascellius's age were normally fairly prolific writers. They would certainly offer responsa when they were asked (for to give legal advice was part of what was expected of an elite male who claimed to have expertise), but these would normally have been delivered orally, or through a brief written communication. To the extent that they were preserved, they might have been collated later, or collected as process notes by a jurist's apprentice (legal knowledge being handed down informally, rather than through formal instruction). They were not designed to be published as a group, much less were they designed to capture the outlines of a larger argument about the nature of law. A responsum was simply a one-off claim about the application of the law to a particular set of facts. It was a declaration, not an argument.

Such declarations may have worked in an age where the *auctoritas* of an expert was relatively stable, but the last century of the Republic was a fraught period, marked more generally by a crisis of *auctoritas*. The progressive fragmentation of an old political system provoked an urgent need to make sense of traditions, and to subject them to reason.[23] As law—not least in the sense of legislation—was implicated in the progressive upheavals of the Republic, jurisprudence changed accordingly. Jurists of the generations before Cascellius had attempted to bring increasing refinement to the civil law as a whole, through attempts at categorization. These attempts, however, tended not to be expressed as theoretical projects but rather as commentaries, occasionally as monographs.[24] Political theory more broadly was anathema to jurists: they preferred to elucidate the civil law by reference to the nature of language or of history. Etymology features throughout their works. Thus, "Servius Sulpicius has recorded that 'religious scruple' [*religio*] is the term attached to something that a certain holiness makes remote [*remota*] and apart from us, as though the term were derived from 'to leave behind' [*relinquere*], as 'reverence' [*caerimonia*] is derived from 'to be in want of' [*carere*]."[25] Sulpicius's usages might have been merely illustrative, but his contemporary, Aelius Gallus, might write an entire work *On the Meaning of Words Relevant to the Civil Law*.[26] Etymological research was just one (particularly prominent) branch of antiquarian research, which other jurists engaged in as well by tracking down supposedly ancient versions of legal formulae,[27] or by harkening back to supposedly earlier, primal moments in Roman culture. The following might be taken as exemplary[28]:

> Labeo says that the origin of the word *supellex* was that it was once the custom to hire to those who were setting out on an embassy those articles which would be of use to them in tents (*sub pellibus*). Tubero attempts to define *supellex* in this way: p. 677 ↳ any *instrumentum* of the head of the household consisting of articles intended for everyday use which do not fall into any other category, as, for instance, stores, silver, clothing, ornaments, or *instrumentum* of the land or of the house. Nor is it surprising that the designation has changed along with the customs of the state and the use of objects; for they used to use earthenware, wooden, glass, or at most bronze furniture, now they use furniture of ivory, tortoiseshell, and silver, even of gold and jewels. Therefore, it is proper to consider the category to which things belong, whether to furniture rather than to silver or clothing, rather than the material of which they are made.

Of course, Servius disagreed with them, but by using an account of language in which words simply meant what they meant, and nothing more.[29]

Two things might here be noted. First, the efforts of jurists to ground their authority were based primarily on things that were both ancient and static. Though jurists might accept that the Latin language changed—slowly—and that institutions changed—again, slowly—the accumulated force of tradition was what justified their practice in the present. Such tradition was not subject to the whims of politics or policy but rather was the evolving product of the civic community, whose evolution moved at a different pace. When interventions were needed, they were made, but made primarily by praetors advised by jurists rather than by politicians who passed legislation in popular assemblies.[30] Second, while this mode of explanation might have been extremely learned and occasionally witty, it was rather thin stuff intellectually—too thin, at least, to justify the social position that jurists arrogated to themselves. Others—not jurists—sought to go farther, and to create systematic restatements of the civil law. Cicero, Varro, and Julius Caesar—the generation's preeminent man of letters, antiquarian, and politician, respectively—all attempted or conceived systematic codifications of law.[31] None are preserved. But all speak to something of a crisis in the social status of juristic *auctoritas*. Reason and responsum sat in tension with one another.

In this context it is worth considering a vignette from a (fictitious) speech that Cicero places in the mouth of the orator Antonius in his treatise, *On the Orator* (55 BC)[32]:

> Often too have I heard how, when Publius Crassus was a candidate for the aedileship, and Servius Galba, his senior and a past consul, was in attendance upon him … a man from the countryside approached Crassus to obtain his opinion: he took Crassus apart and laid the facts before him, Crassus responded (*responsum*) in a way that was more correct than conformable to his interest; whereupon Galba, p. 678 ↳ noting his chagrin, accosted him by name, inquiring what the question was on which he had consulted Crassus. Having heard the client's tale and observing his agitation, "I see," said he, "that Crassus was preoccupied and distracted when he advised you" (*respondisse*): he then seized Crassus himself by the hand and asked, "How now, what ever entered your head to suggest such an opinion" (*quid tibi in mentem venit ita respondere*)? Upon this Crassus, a profoundly knowledgeable man (*homo peritissimus*), repeated that the position was as he had advised and the point unarguable. Galba however, sportively and with varied and manifold illustrations, brought forward a number of analogies and urged many considerations in favor of equity as against rigid law, and it is related that Crassus, being no match for him in discussion—though ranked among the accomplished, Crassus came nowhere near Galba—, took refuge in authorities (*ad auctores confugisse*), and pointed out his own statement both in the works of his brother Publius Mucius,

> and in the commentaries of Sextus Aelius, yet after all admitted that Galba's argument seemed to him persuasive, and very near the truth.

The vignette is, in a sense, an echo of the one that opened this chapter, except that here Crassus and Galba here are supposed to be on the same side. But there is similarly a drama about the relationship between law and political authority. Both Crassus and Galba are sought by—and in turn seek to help—their social inferior, a relationship that expresses their *auctoritas*. But in the one case "helping" is defined as stating the law, in the other as finding a means to promote the desires of his dependent. But whereas Cascellius, through his wit, gets the better of Vatinius, here Galba gets the better of Crassus: by using analogies and equity, he manages to stump Crassus, who can only give citations rather than arguments. In the end, Crassus had to admit that were it not for the tradition in which he had been acculturated, Galba would be correct.

Of course, Cicero was no enemy of jurisprudence, and in the dialogue as a whole the jurists fare rather well.[33] But the vignette captures something of the potential fragility of the juristic *auctoritas* that undergirded responsa in the late Republic more generally. With the crisis of the Republic the jurists would need to find a firmer foundation for their claims about law, and for their supposedly authoritative claims about the correct answers to legal questions.

37.4 Responsa in the Age of Emperors

The professional culture created by Republican Roman jurists emphasized their *libertas*—their freedom to give an answer, even if the answer might not be the one desired by a client. This might prove worrisome: in the case of Cascellius, detractors noted that his ↳ liberty was *contumax* (offensively stubborn); his contemporary, Labeo, was similarly said to be afflicted by a sense of liberty that was "both excessive and deranged."[34] He made sarcastic remarks about the Emperor Augustus, and, like Cascellius, refused to accept the consulship when the emperor offered it to him.[35] Other candidates could of course be found (the consulship offered to Labeo was given instead to his rival, Ateius Capito, known for his *obsequium*), but the existence of a body of men who valued their *libertas*—and might write, speak, and make rulings accordingly—posed a structural challenge to one-man rule. Most emperors would tolerate such men when necessary, but there is reason to think that, to some emperors at least, jurists were at best a necessary evil: Caligula, at the very least, threatened to abolish their profession, since they kept giving responsa that he considered unfavorable.[36]

Censorship would not be the solution. Though the advent of one-man rule was accompanied by the destruction of some bodies of knowledge (Augustus famously burned great piles of prophetic literature, and edited others to fit contemporary circumstances), the better solution was cooption.[37] This seems to be the explanation for one of the most controversial aspects in the history of Roman jurisprudence, the so-called *ius respondendi ex auctoritate principis*—"the right to give responsa on the *auctoritas* of the emperor." The sources for this "right," it must be added, are contradictory and late, and scholars have fought quite literally over centuries as to the proper interpretation of this new institution, if indeed that is the correct name for it.[38] This is not the venue to review the various positions; suffice to say, it appears that there was at least one attempt, if perhaps an abortive one, to link juristic responsa to the more formal machinery of government. More interesting perhaps is that, whatever the *ius respondendi* might have consisted of at the beginning of the Empire, it seems to have had no formal effects on the legal force of responsa themselves: they remained, it appears, largely advisory.

Their "legal" force to one side, there is a change in the nature of responsa (and the jurists who gave them) in the Empire, and these changes must be seen as an effect of imperial power—which, as scholars of imperial poetry have reminded us, works both upon genres and upon groups of professionals in complex and subtle ways.[39] The first change is with the juristic "profession" itself: the age of emperors brings forth p. 680 jurists from new levels of the social hierarchy. No longer just the province of men of senatorial ↳ rank, jurists now begin to come from the second tier of elites (the equestrian order)—and in the case of one, from further down (Pegasus, who was the son of a ship's captain).[40] Certain jurists also serve in the emperor's *consilium*—his circle of advisors, whom he consulted on weighty matters.[41]

The more substantial change relates to genre: rather than individual responsa being collected by students, books of responsa come, in this period, to constitute their own genre. A jurist might compose in multiple genres: by writing a running commentary on the praetorian edict (the main document of Roman civil law), by commenting on the work of his predecessors, and by publishing books of responsa. Of these, the *libri responsorum* were the most "esoteric"—that is, they spoke to an audience of specialists.[42] Perhaps more importantly, giving a responsum was no longer necessarily connected to a particular case: while jurists certainly still answered queries, they similarly engaged in imaginative jurisprudence, crafting elegant answers to complex hypotheticals. One example will suffice. It begins with what purports to be a quotation from a personal letter from a patron to his freedman, the content of which might pose a legal problem[43]:

> "Sempronius to his freedman Zoilus, greeting. By reason of your services and on account of the loyalty you have always shown me, I grant you an unfettered power of testamentary disposition." I ask (*quaero*) whether he [sc. Zoilus] could leave nothing to his patron's son. Paul responded (*respondit*) that the freedman in question does not appear to have obtained an unfettered power to dispose of his property by will.

We should begin by noting that the names are wholly conventions: Sempronius and Zoilos are not real people but anonymous placeholders for a free citizen male and his freed slave, respectively. Accordingly, whether the case was ever actually put to Paul is unclear. The question and answer (*quaero*/*respondit*) is similarly conventional: though "I ask" is given in the first-person singular, there is no actual person doing the asking; there is just the miming of question and answer. It is a mime, moreover, of a conversation between a specialist and one who is ignorant; but in point of fact, again, it is no such thing. It is more likely a learned question put to a jurist by a jurist—or even to a jurist by himself. In that respect it largely resembles cognate works characteristic of the deliberative culture of the high Empire, which prized asking particular questions to enterprising interlocutors precisely so that the interlocutors could show their mastery of material. In this respect, then, the questions and answers of the jurists might be taken as resembling learned texts like Plutarch's *Roman Questions*, where questions (in Plutarch's case, about Roman gods and rituals) provided a point of departure for displays of erudition.

p. 681 There nonetheless remains an important difference: to be able to ask the question correctly, or in an interesting way, presupposed that one only *play* the role of an ignorant person, for in fact the question could only be put properly by an expert. The language of play here is important, for several reasons. First, and perhaps not least, because by "playing" at the game of questions and conundrums, jurists like Paul removed themselves from the active role of the lawyer/administrator to focus on questions of law that seemed interesting or meaningful. (It bears mentioning that the actual, day-to-day work of men like Paul was, in the main, consumed by the excruciating boredom of paperwork and management, combined with the intense danger of being close to the emperor's court. A jurist in Paul's day could certainly lose his life.) Such play also has a sociological function: it not only brings the player into the world (in this case, as a spectator, an imagined audience for the conversation), but it sets the field and the rules as well, determining the structure of the game.

Precisely because responsa were a game (no longer just a genre, or a legal technology), the rules caused disciplinary boundaries to become explicitly policed. To know how to respond elegantly and authoritatively, on the one hand, and to know when to avoid a trap, on the other, was characteristic of the competitive world of male performance so key to structuring and maintaining hierarchies in the Roman world more generally.[44] Like rhetoricians, doctors, and others, jurists too engaged in public disputations; their success or failure ranked them with respect to their peers. But only their peers[45]:

> A man with four hundred made legacies of three hundred; he then devised to you land worth one hundred gold pieces subject to the condition: "if the *lex Falcidia* has no application to my will." Question (*quaeritur*): What is the legal position? I replied that this is an impossible question, styled "a deception" by dialecticians (*dixi* τῶν ἀπόρων *hanc quaestionem esse, qui tractatus apud dialecticos* τοῦ ψευδομένου *dicitur*). For whatever we assert to be true will be found to be false. Here is the proof: If we say that your legacy is valid, the *Lex Falcidia* operates, and so, the condition failing, the legacy will not be due. Again, if the legacy be not valid because of the condition, there will be no place for the *Lex Falcidia*. Furthermore, if the *lex* should not obtain, the condition will be realized, and the legacy will be due to you. Since, however, it would appear to have been the testator's intention (*voluntatem*) that the legacies of others should not be abated by reason of that to you, our better course is to hold that the condition of your legacy is not complied with.

Put aside, for the moment, the legal issue of the *lex Falcidia* (a law that stipulated that the heir in a will had to receive at least a quarter of the estate); we can treat that statute simply as constituting the "rules of the game." The text is remarkable primarily in the way that it constructs juristic authority through the responsum itself. Africanus knows the ↳ difference between a real question, capable of being solved through juristic methods, and a fake, a plant designed to embarrass him. He declines to take the bait. Though it looks like a juristic question, it is really something for the *dialectici*, the rhetoricians, which jurists are emphatically not.[46] His shift of registers—from juristic Latin into Greek—marks this question, linguistically, as an intrusion into a world that he has carefully constructed. Still, he can offer an explanation of what might be done in such a situation: move from the bizarre condition of the gift itself to the intention of the testator. A legal solution is, eventually, found, though one that takes place on the jurist's terms. Law's *auctoritas* is safe.[47]

p. 682

To return, then, to Paul, and his ruling on the estate of Zoilos. Such "conversations" in books of responsa thus could be savored by an in-group of jurists, just as literate men, like Macrobius, would have savored the *bon mots* of Cascellius. But by the time we move from the age of Cascellius (first century BC) to the age of Paul (second–third centuries AD), the entire frame of the discourse has shifted. Rather than being objectively witty, jurists speak through their responsa to other specialists. Here, one must conjure a world of background legal knowledge to understand the import of the decision—why, that is, Paul thinks his opinion is "right." First, one must understand the broader force of the relationship between patron and freedman in order to understand the force of the decision: even though the patron, Sempronius, expressly offers Zoilos the power to dispose of his property in any way that he sees fit, the law would take only partial account of the intentions of the former patron with respect to his freed slave's property. Second, one would have to know that there were statutes that governed the property of freedmen, themselves the product of legal and social expectations concerning the "respect" or "obedience" (*obsequium*) that freedmen owed to their patrons. The operation of the statutes, in turn, was complex, and was variable on the freedman's total estate, the number of legitimate children he had, and his character.[48] Even without worrying about the statutory framework that governed the estates of freed people, one would similarly have to take into account whether the promise of Sempronius (now presumably deceased) could have been imagined to operate even to the disadvantage of his own son. Paul imagines that it cannot.

To reconstruct the reasoning behind Paul's decision involves locating the thinking of this jurist in a carefully constructed juristic universe: it involves being willing to flatten the specifics of a case into standardized patterns, and to imagine a whole machinery of possible exceptions—this is what makes the question put to Paul a *good* question in the first place. We have come far from Cascellius's world, where a responsum applies to Vatinius and a pine cone—that is, to a specific case. To understand Paul involves conjuring a world of law that bears little ontological relation to the grubby, material world—not quite p. 683 Jhering's *juristische Begriffshimmel*, but a world in which extraneous noise has ↳ nonetheless been muted. We might say that, by transforming a set of facts into a legal question, Paul and his questioner have brought us into the realm of deep play, and effected a transformation of the facts of the material world into a different ontological space: following Gadamer, we might further say that "The transformation is a transformation into the true. ... In being presented in play, what is emerges. It produces and brings to light what is otherwise hidden and withdrawn."[49] The price of entering the jurist's world to understand this process—and to understand how jurists crafted a whole literature of responsa—is that we do so on condition of playing their game: acceding to their ontological claims of how law works, and a fortiori, to their authority, by subsuming ourselves within the world of their rules and moves, their goals, and, ultimately, their aesthetic sense of a game well played. We accept that their talent is to sift elegance from nonsense—from cacophony. And in so doing, we accede to their *auctoritas*.

Historically speaking, however, such *auctoritas* held out only for so long. As jurists integrated into the imperial court in the high Empire (particularly under the Severan emperors), the *auctoritas* that their answers contained came to be more closely intertwined with imperial power, and the machinery of normal governance. Emperors came to take over juristic roles—but rather than giving responsa, stricto sensu, they answered correspondence with *rescripta*, imperial guidance on legal matters. Of course, the jurists were always in the background—as draftsmen and consultants—but the process was, in a sense, complete: expert law and political power were reconciled.[50]

37.5 Responsa Beyond Rome

Though *responsa* originated in a Roman context, it would be remiss to close without at least gesturing to other important communities that availed themselves of this legal technology.[51] Perhaps most important among these were Jewish and Muslim communities throughout the medieval and early modern Mediterranean. As far as Jewish *responsa* go, vast numbers are preserved both as books (such as the collection of Maimonides's *responsa*) and in the Cairo Genizah. Characteristic of the world of Jews living in an Islamic context, the status of Jewish *responsa* resembles that of Roman *responsa* in some respects. First, they are similarly anonymized (as are Islamic *responsa*). Second, though they purport to describe Jewish law and how it should apply to particular cases, the *responsa* themselves had largely advisory force. Litigants p. 684 could write to an expert in ↳ jurisprudence, who would then offer a decision on the case; he was not, however, identical to a judge: rather, the *responsum* itself would then be used to guide subsequent legal practice as a claim to what the law *ought* to be. Judges—be they Jewish or Muslim—were free to disregard it, and litigants (for their part) could ask the opinions of multiple experts. Jewish experts, it seems, often crafted their *responsa* knowing well that the people whom they advised might find relief in Muslim courts. Accordingly, they sought not just to get the law "right," they similarly sought to persuade others that their interpretation was the optimal one. In the words of Phillip Lieberman, they might be considered not authoritative statements of the law itself, but rather a form of "expert testimony."[52]

Islamic *responsa*, or *fatwās*, operate in a similar fashion, although here perhaps the great geographical diversity of the Islamic world makes generalization difficult.[53] Crafted by a *muftī*—an expert in jurisprudence—*fatwās* operated to guide court practice in the course of litigation. Like a Roman jurist, the *muftī* was in theory a learned person, rather than a government functionary: his learning stemmed from *ijtihād*, "exertion" or struggle to produce the correct legal answer—a disposition that was of especial importance in that Muslim jurists were, in essence, trying to understand and apply the law of God.[54] However, in Islamic societies the relationship between the judge (*qāḍi*) and the state, on the one hand, and the body of legal experts, on the other, was in practice complex.[55] *Muftīs* could operate independently, or be formally attached to courts as legal experts. In the latter case, disregarding their rulings would be more of a challenge. It was not until the Ottoman period, however, that *muftīs* became more intimately connected to the state.

To be sure, far more remains to be said about the later history of *responsa*—the brief comments above can no more than mark that they were a phenomenon that was essential for the development of law—and its intersections with both official power and daily life—throughout the Mediterranean world more generally. I should like to close, however, by gesturing to the importance of *responsa* more generally for our understandings of contemporary law. To the extent that they were an essential technology for the development of jurisprudence, they are also useful in reminding us of a world before law was completely captured by the state. In such a world, law was imagined to emerge from the conversations between learned men and laypersons—anchored in face-to-face contacts, and unmediated by bureaucracies. One must not fetishize such a world, of course: one participated in it only by accepting, ex ante, the *auctoritas* of experts. Yet such acts of imagination are useful, if only as one of the ways that history—and the humanities more ↳ broadly—can enrich our understandings of law more generally: by enabling us to envision alternatives, and by denaturalizing phenomena that are imagined, by others, to be self-evident.

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1 2.6.1, trans. Kaster, LCL. Ancient sources are cited according to the conventions of Simon Hornblower, Antony Spawforth, and Esther Eidinow, eds., *The Oxford Classical Dictionary*, 4th ed. (Oxford: Oxford University Press, 2012). Fragments of juristic texts are cited from the edition of Philipp Eduard Huschke, Emil Seckel, and Bernhard Kübler, *Iurisprudentiae Anteiustinianae Reliquias in Usum Maxime Academicum Compositas* (Leipzig, Germany: Teubner, 1909) (hereinafter *IAR*). Translations of the *Digest* are from Alan Watson, ed. *The Digest of Justinian* (Philadelphia: University of Pennsylvania Press, 2009, orig. 1988).

2 Dates from T. Robert S. Broughton, *The Magistrates of the Roman Republic*, 3 vols. (New York: American Philological Association, 1951–1960).

3 *Dig*. 1.2.2.45 (Pomponius, *Enchiridion*). Cascellius's opinions are collected in Otto Lenel, *Palingenesia Iuris Civilis*, 2 vols. (Leipzig, Germany: Bernhard Tauchnitz, 1889), I: cols. 107–108, with additional material in *IAR* (Cascellius). On his career and outlook, see Richard A. Bauman, *Lawyers in Roman Transitional Politics: A Study of the Roman Jurists in Their Political Setting in the Late Republic and Triumvirate* (Munich, Germany: C.H. Beck, 1985), 117–123.

4 Val. Max. 6.2.12.

5 Cf. Cicero's critique of the edict of Verres, praetor in 74 BC: *Verr*. 2.1.40–46.

6 On deference, see J. E. Lendon, *Empire of Honour: The Art of Government in the Roman World* (Oxford: Clarendon Press, 1997).

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8 Cf. Cic. *De or*. 3.133–35. The best account of Roman legal writing remains Fritz Schulz, *History of Roman Legal Science* (Oxford: Clarendon Press, 1946), to which my account owes an obvious debt. For a useful recent overview of juristic education, see Jill Harries, "Legal Education and Training of Lawyers," in *The Oxford Handbook of Roman Law and Society*, ed. Clifford Ando, Paul J. du Plessis, and Kaius Tuori (Oxford: Oxford University Press, 2016), 151–163.

9 *Dig*. 1.2.2.6 (Pomponius, *Enchiridion*).

10 *Dig*. 1.1.1.1 (Ulpian, *Institutes* 1).

11 Clifford Ando, *The Matter of the Gods: Religion and the Roman Empire* (Berkeley: University of California Press, 2008); Jörg Rüpke, *Religion in Republican Rome: Rationalization and Ritual Change* (Philadelphia: University of Pennsylvania Press, 2012); Duncan Macrae, *Legible Religion: Books, Gods, and Rituals in Roman Culture* (Cambridge, MA: Harvard University Press, 2016).

12 On formalism in Roman religion, cf. John Scheid, *Religion et piété à Rome* (Paris: Éditions la Découverte, 1985).

13 Gai. *Inst*. 4.11.

14 Gai. *Inst*. 2.116–2.117.

15 Gai. *Inst*. 1.119.

16 Cf. *ILS* 8381 = *FIRA* I 63, a ruling of the pontifices concerning the moving of a corpse.

17 Sacrifice: Plin. *HN* 8.77 = *IAR* (Coruncanius), frg. 1 on the ruling of Ti. Coruncanius (consul 280 BC, pontifex maximus *c*. 255 BC): "Coruncanius ruled that ruminant animals were impure as sacrifices until they grew their front teeth." Prodigies: M. Porcius Cato Censor (consul 195 BC, possibly also an augur): August. *de Doctr. Chr*. 2.20 = *IAR* (Cato) frg. 2.

18 On distinguishing these bodies of knowledge, cf. Cic. *Leg*. 2.53 = *IAR* (Scaevola), frg. 3.

19 See recently Mary Beard, "Cicero's 'Response of the Haruspices' and the Voice of the Gods," *Journal of Roman Studies* 102 (2012): 20–39, discussing Cicero's speech *de Haruspicum responsis*.

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21 *ILS* 8365; cf. *CIL* VI 38585: *d(olus) m(alus) ab(esto) <et> iuris studiosus*; *CIL* VI 8861: *ab iis omnibus dolus malus abesto et ius civile*.

22 Callie Williamson, *The Laws of the Roman People: Public Law in the Expansion and Decline of the Roman Republic* (Ann Arbor: University of Michigan Press, 2005), esp. 386–397. There are of course counter-examples: e.g., Gell. *NA* 17.7.3 = *IAR* (Manilius), frg. 9.

23 See esp. Claudia Moatti, *The Birth of Critical Thining in Republican Rome*, trans. Janet Lloyd (Cambridge: Cambridge University Press, 2015).

24 Schulz, *History of Roman Legal Science*, 90–96. See also, with further bibliography, Ulrike Babusiaux, "Legal Writing and Legal Reasoning," in *The Oxford Handbook of Roman Law and Society*, ed. Clifford Ando, Paul J. du Plessis, and Kaius Tuori (Oxford: Oxford University Press, 2016), 176–187.

25 Macr. *Sat*. 3.3.8 = *IAR* (Servius), frg.14.

26 *IAR* (Aelius Gallus), the only work of his preserved.

27 Aul Gell. *NA* 16.4.1–16.4.4 = *IAR* (Cincius), frg. 12–13.

28 *Dig*. 33.10.7 (Celsus, *Digesta* 19).

29 Schiavone, *Invention of Law in the West*, 262–267, gives a rather more favorable verdict on Servius.

30 E.g., Aul. Gell. *NA* 20.1.13, with Ari Z. Bryen, “Labeo’s *Iniuria*: Violence and Politics in the Age of Augustus,” *Chiron* 48 (2018): 17–52. Cf. Suet. *Gram*. 22 for a debate about this problem in the generation after Cascellius, where the power of the emperor to effect change through language is called into question.

31 On these projects, see Aul Gell. *NA* 1.22.7 and Suet. *Caes*. 44 on Cicero and Caesar, respectively; according to Jerome (*Ep*. 33), Varro wrote a treatise *de Iure Civili* in fifteen books.

32 *De Orat*. 1.239–1.240, trans. LCL with modifications.

33 See, in general, Elaine Fantham, *The Roman World of Cicero’s* De Oratore (Oxford: Oxford University Press, 2004), 102–130.

34 Val. Max. 6.2.12 and Aul. Gell. *NA* 13.12: *libertas quaedam nimia atque vecors*.

35 Dio 54.15.7; *Dig*. 1.2.2.47 (Pomponius, *Enchiridion*). The issue of the consulship is vexed: Tacitus (*Ann*. 3.75) denies that it was offered to him.

36 Suet. *Gai*. 34: *de iuris quoque consultis, quasi scientiae eorum omnem usum aboliturus, saepe iactavit se mehercule effecturum ne quid respondere possint praeter eum*.

37 Suet. *Aug*. 31; Tac. *Ann*. 6.12.2. Cf. Suet. *Gai*. 16 on censorship of other works by later emperors.

38 A guide to the bibliography from the early modern period on can be found in Kaius Tuori, *Ancient Roman Lawyers and Modern Legal Ideals: Studies on the Impact of Contemporary Concerns in the Interpretation of Ancient Roman Legal History* (Frankfurt am Main, Germany: Vittorio Klostermann, 2007), 71–134.

39 Peter White, *Promised Verse: Poets in the Society of Augustan Rome* (Cambridge, MA: Harvard University Press, 1993); Alessandro Barchiesi, *The Poet and the Prince: Ovid and Augustan Discourse* (Berkeley: University of California Press, 1997).

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43 *Dig*. 38.2.47.2 (Paulus, *Responsa* 11).

44 See, in particular, Maud W. Gleason, *Making Men: Sophists and Self-Presentation in Ancient Rome* (Princeton, NJ: Princeton University Press, 1995); and *ead*., “Shock and Awe: The Performance Dimension of Galen’s Anatomy Demonstrations,” in *Galen and the World of Knowledge*, ed. Christopher Gil, Tim Whitmarsh, and John Wilkins (Cambridge: Cambridge University Press, 2012), 85–114.

45 *Dig*. 35.2.88 (Africanus, *Quaestiones* 5).

46 Cf. Aul. Gell. *NA* 9.15, for a similar case in which a rhetorician takes the bait.

47 See further Ari Z. Bryen, “When Law Goes Off the Rails, or, *Aggadah* among the *Iurisperiti*,” *Critical Analysis of Law* 3 (2016): 9–29.

48 For an overview, see Jane F. Gardner, *Family and Familia in Roman Law and Life* (Oxford: Clarendon Press, 1998), 55–67.

49 Hans-Georg Gadamer, *Truth and Method*, trans. Joel Weinsheimer and Donald G. Marshall, 2nd ed. (London: Continuum, 1989), 112.

50 Tony Honoré, “Roman Law A.D. 200–400: From Cosmopolis to Rechtstaat?,” in *Approaching Late Antiquity: The Transformation from Early to Late Empire*, ed. S. Swain and M. Edwards (Oxford: Oxford University Press, 2004), 109–132; Tony Honoré, *Emperors and Lawyers*, 2nd ed. (Oxford: Clarendon Press, 1994).

51 For assistance with what follows, I thank my colleagues Phil Lieberman and Leor Halevi, who should not be held accountable for any of its shortcomings.

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53 For an overview of the diverse traditions of Islamic responsa, see Muhammad Khalid Masud, Brinkley Messick, and David S. Powers, “Muftis, Fatwas, and Islamic Legal Interpretation,” in *Islamic Legal Interpretation: Muftis and Their Fatwas*, ed. Muhammad Khalid Masud, Brinkley Messick, and David S. Powers (Cambridge, MA: Harvard University Press, 1996), 8–15.

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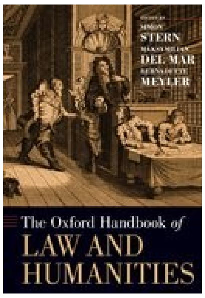

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CHAPTER

38 Legal Treatise

Steven Wilf

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Abstract

The legal treatise is a subject with a pedigree. Previous essays by A. W. B. Simpson, Morton Horwitz, Angela Fernandez and Markus Dubber, and Christopher Tomlins identify different ways that the treatise genre captures the essence of existing law and aspirations. Disembarking from these important contributions, this chapter draws upon such diverse fields as the history of the book, literary genre studies, information management, and the sociology of knowledge. It underscores the multiplicity of the treatise's genre ecosystem. The legal treatise simultaneously serves as a site for the production of knowledge, a stepping stone or even substitute for codes, fabricated order, a mechanism for establishing authorial authority, a professional talisman, a technic of systematizing and organizing information, a legitimization of existing norms, and a means of constructing a national jurisprudence akin to the way a dictionary might define a national language. Focusing largely on common law treatises of the long nineteenth century, it interrogates how these competing goals might exist within a single literary artifact. What pressures threaten to unravel the legal treatise's claims to monumental authority? And how can its power erode? The chapter's salient contribution will be its highlighting the importance of time. The legal treatise is a genre which simultaneously asserts its place as a *summa* of legal knowledge and—as the commonplace historical introduction often underscores—while continuing to be subject to countless revisions. It is a text readied for obsolescence. Beneath the treatise's façade of professional authority lies a profound anxiety about its own timelessness.

Keywords: legal treatise, historical jurisprudence, American legal history, history of the book, law books, legal codes, legal literature, digital humanities, legal database, law schools

Subject: Jurisprudence and Philosophy of Law, Law and Society, Law

Series: Oxford Handbooks

Collection: Oxford Handbooks Online

WHAT is a legal treatise? This chapter will do everything possible to avoid answering that question in a straightforward fashion. In their important essay on the treatise, Angela Fernandez and Markus Dubber declared that “the attempt to settle on ‘the’ definition of the treatise is as futile and uninteresting as most definitional quests.”[1] I have sidestepped the conundrum of trying to define the treatise not because it is a “futile and uninteresting” task, but because the genre itself is inherently unstable. In the common law context, it tries to do what the legal case does not: to think beyond the instant controversy to broader legal principles and create a kind of *summa* of doctrine. As I will show, this enormous task has led to the emergence of a legal literary genre that is the opposite of what was intended. Instead of being an unchallenged source of legal authority, the treatise often becomes the site of conflict.

It might be easier to say what a legal treatise is *not*. Undigested abridgements or digests of cases and practical guides to implementing decisions such as Justice of the Peace manuals should be excluded as too narrowly focused. Although remaining a matter of debate, overly broad descriptions of law operating outside specific subject matter—such as William Blackstone’s *Commentaries on the Laws of England* (1765–1769) or Chancellor Kent’s *Commentaries on American Law* (1826–1830)—might cover too much ground to allow for the analytic reframing of particular areas of law. The shadow cast by cover-the-waterfront works such as Blackstone or Kent most likely prompted the writing of treatises mastering only a limited field of law. Such tasks as systematizing the thicket of dense case law were left to the treatise. We therefore should not overemphasize classification in order to distinguish a genre from neighboring literary forms. I hope that we can duck the question of who is a member of the club by merely deploying as a working definition prolific mid-nineteenth-century American treatise writer Joel Prentiss Bishop’s description of the treatise as “an orderly statement of those principles ↳ in which the law consists, whether drawn from the reports of law cases, from natural reason, or from any other source.”[2]

The legal treatise is part of a much broader genre ecology that is only beginning to be explored by scholars. Perhaps because we have so long considered law as an abstraction distanced from norms carved on stone tablets or failed to admit the talismanic implications of its textual objects we find ourselves as moderns surprised by now confronting law’s material circumstances. History of the book scholarship, on the other hand, has often overly focused on a particular material object while ignoring the many other ways law might be articulated in diverse forms. How is law embodied? Partly the treatise might be seen as an institutional space constructed specifically for legalism in much the same ways as courts or prisons. Bruno Latour has shown how law inhabits these places as a cultural habitus following a distinctive set of expert guidelines. Partly the treatise is a professional insignia encompassed by tangible literary objects. Cornelia Vismann has brilliantly described the importance of bureaucratic files for legal process, and, most certainly, other texts similarly represent claims to professional authority.

This chapter focuses on a single species, the legal treatise, amidst a much larger genre ecosystem that includes official and extra-official texts: judicial decisions, statutes, case digests, eighteenth-century hanging ballads and twentieth-century corporate employment guidelines, administrative agency compendia, casebooks, legal emblem and maxim books, and practice manuals. Like many of these texts, the treatise serves as an instrument of information transmission and storage. Each of these forms a linkage between norms and rhetorical practices. Drawing upon the analogy to the environmental sciences, a genre ecosystem is a complex network of interacting forms. These must be examined in comparison to other modes of embodying law—and, more particularly, there is a need to identify the distinctive features of each genre. The treatise stands out because of its hubris. It is not the doorstop size of a legal treatise’s volumes that expresses its audacity. Rather, it is a claim to comprehensiveness. Treatises commonly assert mastery over a vast, complicated terrain of legal decisions. In short, the legal treatise as a genre makes the most capacious of claims to embodiment. Representing an entire area of legal knowledge, it signifies a brooding omnipresence on the page.

Yet despite the hauteur of seeing itself as the *summa* of legal knowledge, the legal treatise constitutes an unstable genre. Indeed, it is the varied *purposes* of the legal treatise that lead it to become a disorderly text. According to the classic formulation of Frederick C. Hicks, who was Yale Law School's librarian during the interwar years, the treatise, through connected literary form, seeks to "discuss, criticize, restate, or attempt to bring about change in ideas concerning one or more of its numerous aspects."[3] Restate and criticize are two tasks often at odds with each other. A distinctive feature of the legal treatise is its disinterested, p. 689 presumably objective posture that summarizes in its own ↳ words rather than quotes cases. By harboring aspirations, however, the treatise's neutral narrative voice might be undermined. My purpose, then, is to place the legal treatise within its literary context and to tease out the various harmonic ranges embedded in this presumably singular form. Drawing upon such diverse fields as the history of the book, literary genre studies, information management, and the sociology of knowledge, this chapter underscores the incongruity of the treatise's authorship as the product of both a detached, impartial narrator and its aspirational aims.

It is also important to step away from debating what constitutes a treatise or examining competing stances toward authorship, and ask a different question: what is the cultural *practice* of this genre? The legal treatise is large, it contains multitudes. It simultaneously serves as a site for the production of knowledge, a stepping stone or even substitute for codes, a gesture toward making a legal science, fabricated order, a mechanism for establishing authorial authority, an archive, a professional talisman, the vehicle for carrying legal norms across the Atlantic between Britain and the United States—and therefore the literary fulcrum of comparative law, a technic of systematizing and organizing information, a legitimization of existing norms, a means of constructing a national jurisprudence akin to the way a dictionary might define a national language, and a monument—all the while often seeking to be an aspirational manifesto for legal change.

How do these competing goals exist within a single literary artefact? What pressures threaten to unravel the legal treatise's claims to monumental authority? The legal treatise is an unstable genre in two ways: the first, as described, by virtue of its manifold, often competing purposes. But, second, because it is ever so sensitive to the ravages of time. The legal treatise is a genre which simultaneously asserts its place as the apotheosis of accumulated legal knowledge—as the commonplace historical introduction especially underscores—yet ultimately will be subject to countless revisions. It is a text that at the moment of its publication is primed for obsolescence. My argument is deceptively simple: beneath the façade of professional authority lies a profound anxiety about its own character and timelessness.

Before outlining the general structure of this chapter, I should explain its particular setting of chronological and territorial boundaries for the topic. Much of what will be discussed in this brief foray into the treatise as genre focuses upon American legal texts from the 1830s to the 1930s. There are a variety of reasons for this narrowing of the chapter's scope—not the least being the circumscribed length of the chapter itself. Treatises, as I will argue, are a particular product of Anglo-American common law.[4] Common law's reliance upon precedent generated through judicial decisions in case law exacerbates the problem of information p. 690 management. The irony is that a system of law that ↳ relies upon *communis opinio* found itself fractured by competing legal rules often reflected in a splintering of case law. The treatise emerged as a response to this dilemma.

Examining the legal treatise particularly in the American context, rather than pursuing a *tour d'horizon* across the globe, has particular advantages. Such a case study permits the surfacing of how what Peter Burke calls knowledge exiles deployed the genre to construct a law for the periphery of the early nineteenth-century common law world. American treatises in the Early Republic were a response by provincials to British attempts to collect and systematize its own legal decisions. US Supreme Court Justice Joseph Story's series of treatises, *Bailments* (1832), *Constitutional Law* (1833), *Conflict of Laws* (1834), *Equity Jurisprudence* (1836), *Equity Pleading* (1838), *Agency* (1839), *Partnership* (1841), and *Bills of Exchange* (1843) provide a one-man-band marching toward treatise writing. By focusing simply on the United States in the heyday of treatise writing—the long nineteenth century from 1830 to 1930—a coherent narrative can be constructed. It traces the genre's historical arc from a golden age in the 1830s to what I identify as a silver age on the cusp of emerging legal realism a century later. Ultimately, after the 1930s, the genre will be marginalized.

This chapter is divided into three sections. Section 38.1 examines competing legal historical narratives about the meaning of the treatise. The legal treatise is a subject with a pedigree. Four seminal essays written by eminent legal historians have defined how we think about this particular fabrication of literary form. Writing in the midst of debates over critical analysis of law, A. W. B. Simpson identified the treatise as a common law form of summation for legal doctrine. Its rise was marked by nineteenth-century demands for a tidy form of legal thinking. The doctrinal skepticism of legal realism doomed the genre by the 1930s. Morton Horwitz underscored the importance of treatises for legal historians. In his view, the genre serves as a freeze-frame of law as it is conceived in a given moment of time. Angela Fernandez and Markus Dubber argued that the treatise was a more or less stable mixture of law as it is and law as it should be. They foregrounded the utopian dimension within the legal treatise. Christopher Tomlins identified the treatise as a legal technology with set purposes. Many of the objectives identified by Tomlins are deeply instrumental. Indeed, the very act of recordation and systematization is an exercise of power.

Section 38.2 disembarks from these important contributions. It traces the narrative arc of treatise-making from the American Early Republic to the period of the New Deal. This section establishes a chronology for the legal treatise from a golden age in the 1830s through its heyday in the middle of the nineteenth century to a silver age in the end of the nineteenth and beginning of the twentieth century at the very moment that legal realism posed a threat from just beyond the horizon. This story is fairly conventional. By the second half of the nineteenth century, the profusion of treatise publications meant that volumes were now defining themselves through their differences from one another. I hope to show that each twist and turn in the development of the genre resulted in its embodying an ever-growing number of contradictions.

Section 38.3 addresses the issue of the treatise's role in an increasingly electronic information age. It suggests that the very success of the legal treatise in establishing its ↳ authority helped prompt its near demise. I conclude with a number of questions: does the legal treatise have a future in the electronic age? How have its material embodiment, authorship, and reading practices shifted over time? What is the role of authority in the making of the treatise? And how might we consider the multiple purposes and meanings of the treatise as a literary genre?

38.1 Uncertain Genealogies

Since the 1970s the legal treatise has been a subject of debate by some of the most important legal historians. A. W. B. Simpson, Morton Horwitz, Angela Fernandez and Markus Dubber, and Christopher Tomlins contributed essential elements to what is now a half-century old conversation. This chapter is intended as yet one more iteration of this discussion about the salience of legal literary form. But, since one of the major themes is the elusiveness of summation, it hardly will be the last.

Simpson calls attention to the rarity of legal treatises—the monographic concentration of a text on a given area of law—in Roman law.[5] Roman legal science had a preference for stolid, bulky codes, and—at least for their literary legal legacy—eschewed abstraction. For Simpson, the sudden appearance of Littleton's *Tenures* (*c.* 1480), a remarkable work summarizing cases, setting out definitions, and establishing principles, marks the beginning the treatise genre. Littleton appears when it does to make sense of a hodgepodge of English land law inherited from a mix of Anglo-Saxon and Norman sources. It might be argued that its clarity is less "mysterious," to use Simpson's term, than an illustration of how law functioning within a periphery subject to conquest might require more rationalization through abstraction than norms imposed by an imperium.

According to Simpson, there was a long hiatus between Littleton and the emergence of a series of treatises in the eighteenth century. Between these two periods, Simpson argues, the seventeenth century witnessed the collapse of the collective exercises of learning in the Inns of Court, an increase in the size of the legal profession, and the proliferation of non-authoritative legal texts—all this lending support to the idea that common law was an ungodly jumble.[6] Simpson's claim for the early modern rise of the common law treatise largely sets forth an internal account punctuated by particular professional circumstances. Yet there is a much larger comparative historical narrative operating in this instance. Common law developed in the distant past within a somewhat isolated island nation. However, the jostling over transatlantic hegemony in the eighteenth century leads to England setting forth a series of what we today would describe as soft power p. 692 arguments—one notably about the virtues of its legal system. ↳ The once aloof legalism of the common law was valorized in comparison to French civil law for its liberties. But the English were forced to engage in apologetics about the common law's absence of systematic order.

Horwitz underscored the importance of treatises for legal historians.[7] The genre, in his conception, serves as a freeze-frame of law as it is conceived in a given moment of time. Horwitz has been perhaps our most astute legal historian of major paradigm shifts in legal doctrines. In many ways, his discussion of the treatise genre reads like a methodological excursus for his magnum opus, the two-volume *Transformation of American Law*. The treatise as a summary of existing law allows an historian to glimpse hidden changes in legal thinking. To borrow a metaphor from science, the treatise serves as a kind of cloud chamber that renders visible the otherwise opaque antics of subatomic particles. Yet so much is missing from this description. Horwitz's preoccupation with the treatise as an historical artefact, for example, does not engage with the problem of identifying the *contemporaneous* readership for a treatise or its purposes. How might we consider the legal treatise as a literary genre on its own terms?

Paul Klee described a line as a dot that went for a walk. And, perhaps, that might be the best description of how Fernandez and Dubber conceive of the legal treatise. No doubt there are dots—depictions of law in its current state of play. But they emphasize the significance of the aspirational, reforming impulse within the treatise genre. Treatise authors, they contend, often advocated for changing legal norms to improve them in a variety of ways. The treatise was, in their words, "a more or less stable mixture of elements of *lex lata* and *lex ferenda*" (*law as it is* and *law as it should be*). Finally, Christopher Tomlins reminds us to constantly think about treatise writing as the construction of a legal technology. The treatise is a mechanism that seeks to exert power—sometimes simply accruing reputational capital for its author, sometimes serving the interests of economic and political stakeholders using the law to gain advantages, and sometimes reflecting a strongly ideological posture.[8]

Why does this historians' debate (*Historikerstreit*) matter? Perhaps Simpson is correct that every legal system has its own genre. The treatise asserts a particular authority within the ambit of the common law system. While statutes are passed by elected legislatures and cases are decided by duly elected courts, a treatise writer remains simply a self-appointed scribbler with no inherent legitimacy. It is the work itself—its prestige claims of exhaustive erudition or clarity in aligning legal decisions with fundamental normative principles—that bolsters its insistence upon normative significance. Treatises do not subordinate legislative enactments. Yet they often are intended to function as signposts to guide legislators in order to safeguard the consistency of the law.[9] Harvard Law Professor James Bradley Thayer asserted in his treatise p. 693 on evidence law (1898) that ↳ he would provide "the true character of our rules of evidence."[10] Presumably, that character had been masked by the plethora of official law—and surprisingly it is only the *extra-official* legal treatise that uncovers the sinews of authentic law. Such a construction of juridical space to make enormous claims might be a particular feature of the common law system where authority is diffuse.

Whatever their differences, legal historians Simpson, Horwitz, Fernandez and Dubber, and Tomlins interrogate the grounding of the treatise's turn toward legitimation.

38.2 The Treatise Against Itself

It is not surprising that the earliest notable American law treatise, Tapping Reeve's *Law of Baron and Feme* (1816), examining family law, emerges from the environment of what was then the preeminent training ground for attorneys, the Litchfield Law School (1773–1833). One of the functions of the treatise is to extend pedagogy beyond the physical limits of place. With an insufficient number of law reports circulating, it served as a kind of distant learning in lieu of formal in-person instruction. It was the next step in a natural progression from law office apprentice training to a formal law school (Litchfield was the first law school in the United States) to print culture. Indeed, Reeve explicitly states that the purpose is "to bring into one connected view" an area of law for a readership of students. To serve this particular audience, *not* jurists, he focuses on the commonalities of common law rather than upon differences between particular jurisdictions.[11] Intriguingly, Reeve's discussions of legal relations among husbands, wives, and children seems to mirror the family romance of so many intertwined norms that as a treatise writer he hoped to untangle.

For legal writers in the period of the early Republic, the publication of legal treatises was part of a much larger project of separating American culture from Britain's. Such an objective might be seen in the making of Noah Webster's dictionaries, the calls throughout the nineteenth century for creating a distinctly American literature, and—in the legal sphere—reception statutes passed by newly formed states that accepted certain English laws as precedent but not others. Indeed, American literature as a whole experienced an anxiety of influence as British works were readily available without payment of copyright royalties through almost the entire nineteenth century.[12] In 1830, the *American Jurist* called the legal treatise the path to "emancipation from this oppression … of foreign juridical authority."[13] Thomas Sergeant, p. 694 Benjamin Franklin's son-in-law, stated ↳ that the goal of his *Constitutional Law* (1822) was simply to demonstrate the uniformity of America's "National Jurisprudence."[14]

But, ironically, it was just as frequently a way of linking America to Britain as two peoples *not* separated by a common law. During its golden age, exemplified by the works of Joseph Story, the legal treatise summoned up the illusion of a coherent and unified Anglo-American common law. While it might have been conceivable to view any British decisions issued after the American Revolution as simply irrelevant to US law, Story's treatises continued to cite nineteenth-century British case law as authoritative renderings of a shared common law. Moreover, Story's treatises served as a riposte to the drumbeat for codification that emerged in the United States between 1820 and 1860. Eminent American historian Charles Warren called this period "the era of codes." Yet mostly what occurred was a debate over the importance of codes, not codification in practice. In the beginning of this time frame, admirers of France and proponents of change often backed codification while Anglophile conservatives, who emphasized the common law grounding of US law, sought stability through the composition of treatises.

Much like Reeve, Story saw the treatise as a bully pulpit. While serving on the Supreme Court, he also held a post as Dane Professor of Law at Harvard Law School. The treatises were a way to extend his audience beyond the classroom. Yet this genre was also a means to construct a parallel, orderly legal landscape even as Jacksonian democratic politics—which he deeply opposed—proved increasingly unruly. But the edifice Story was building did not emerge as a vast canvas describing the entire warp and woof of law similar to the commentaries of Blackstone or Kent. Instead, he wrote volumes on particular areas of law much like a judge who keeps his focus narrow enough to see the depth of the issues.

Story's impressive roster of nine treatises focusing particularly upon private law are clearly part of a British treatise writing tradition. Joseph Chitty's English treatise on pleadings (1808), for example, is a genealogical precursor. Story also served as a bridge back to Britain by introducing its lawyers to American jurisprudence. In 1839, Story's treatise on *Bailments* was published in London, and his various treatises were frequently reprinted abroad. The irony was that works intended to establish a national jurisprudence proved to be ideal vectors for cross-fertilization between different legal systems. Kent Newmyer, Story's leading biographer, points out that Story sought to create a genre more theoretically robust than the English treatise tradition. In his introduction to the treatise on *Bailments* (1832), Story writes that Continental jurists provide "an elaborate, theoretical fullness" while the English treatise authors remain eminently practical. He proposes a new American model of treatise writing that would provide a "union of the two plans."[15]

Story's world view of a common Anglo-American legal tradition was not universally shared. Theodore p. 695 Sedgwick, Jr.'s treatise on the rules governing statutory interpretation ↳ (1857) provides a sharp counterpoint to Story. Sedgwick was a legal partner of David Dudley Field, who was known for his commitment to the codification project, and a political associate of Jacksonian polemicist William Leggett. In the introduction to his treatise, Sedgwick claimed to be eschewing politics—but that was anything but the case. His treatise denied the validity of British legal opinions decided after the American Revolution. It sought to straitjacket common law jurisprudence from the bench by producing an assortment of interpretative rules for statutory interpretation. Written law, not common law, was valorized in Sedgwick's treatise.

Both Story and Sedgwick were viewed as authoritative even though they stood as sparring antagonists in the literary legal arena. Nevertheless, they shared a dedication to celebrating American law's progress. In much the same fashion, George Bancroft, preeminent nineteenth-century American historian and promoter of American expansion as Secretary of the Navy, claimed legal treatise literature constructed a science of law heading toward perfection. It would "expel from our shelves the ponderous mass of foreign lore" and become the "ornament of the libraries of foreign jurists."[16] There are, of course, reasons grounded in the history of the book for the impressive enlargement of American law treatises in the nineteenth century. Less expensive printing, the rise of major publishing houses, and the advantages of treatises being necessarily an American product (as opposed to royalty-free British treatises prior to the 1891 introduction of international copyright) all may have contributed to the attractiveness of US law treatises as a publishing venture.

Yet what constitutes foreign law? In an attempt to be comprehensive, treatises often included a pastiche of US opinions, British court decisions as part of a broader common law, *and* comparative law as reflecting natural law principles. Take, for example, as an aspirational legal treatise, Gulian C. Verplanck's *Essay on the Doctrine of Contracts* (1825). A polymath, Verplanck was chair of the powerful House Ways and Means committee as congressman from New York as well as a participant in the Knickerbocker literary circle, which included Longfellow and Oliver Wendell Holmes, Jr.'s father. He was also an editor of Shakespeare's works. His treatise strongly supported a will theory of contracts. According to Verplanck, comprehensive principles of justice, not a national legal system, should determine the structure of legal norms. All contracts cases, he argued, should be decided by "a few broad rules founded in nature, conscience, and reason."[17]

If the problem for the American treatise in its golden age during the 1830s was the insufficiency of existing US law, by the time of the Civil War treatise authors were awash in a sea of decisions. William Blake Odgers, author of a treatise on libel and slander (1881), disparaged those authors who failed to properly systematize legal opinions. "A huge collection of reported cases piled one on the top of the other is not a legal treatise," p. 696 he wrote, "any more than a tumbled pile of bricks is a house."[18] Joel Prentiss Bishop ↳ referred to the "unsightly heap of things" that constitute this mass of common law legal opinions.[19] But this surplusage of law also created possibilities. Bishop pronounced that all this Anglo-American legal writing provides more raw material than as of yet "gathered in the juridical field of the world."[20]

How should one organize such a mass of material? Sometimes it helps to understand a literary genre by asking where its texts commonly begin. There are three approaches for legal treatises—and often nineteenth-century American examples of the form commence from *all* these starting points. A number of treatises lead with the first few pages dedicated to defining key terms in the field. What is evidence or a bailment? Such a foundation immediately lays claim to analytic rigor. Second, some early nineteenth-century treatises inserted lists of cases at the beginning of the treatise rather than as an index at the end of the volume. Such a literary form suggests the salience of case authority. Footnotes appeared in Supreme Court citations in 1887. The first string citation in a footnote could be found in an opinion authored in 1894 by Justice Harlan.[21] However, the footnote appears in the American treatise tradition much earlier and sets the tone for constant citation. The use of a similar citation for both cases and treatises clearly suggests that they prod each other forward in noting an ever burgeoning number of legal opinions. As Anthony Grafton suggests, footnotes create a sense of common membership in an epistemological club.

Third, treatises often include historical introductions. Joseph K. Angell and Samuel Ames's *Treatise on the Law of Private Corporations Aggregate* (1832), for example, traces a whiggish history of corporations from Roman times. Corporations provided a form of government after the Roman imperium collapsed, served as the embodiment of liberty in the Italian Renaissance republics, and grounded the development of school districts within the United States. The authors' historical defense of corporations as an agency of republicanism was clearly situated as a rebuke to the direct democracy of Jacksonian American even though the political significance of the treatise was never unambiguously articulated. The authors seek to ground the treatise in the past's firmament—and often as a final stage in evolutionary progress of legal principles. But this is ironic. Historical narrative undermines a sense of immutable principles. A treatise might not be the final word on the subject given the earlier iterations that have been pushed aside. The fact that all three of these approaches are commonly found in a single treatise should not be surprising. Just as an epic is launched with an invocation to the muses, treatises commence with those elements emphasizing their legitimacy: analytic rigor, exhaustive citation, and historical grounding.

We know remarkably little about the protocols of reading legal materials. Nevertheless, it is safe to assume treatises were read by two different types of readers—those who sought to sidestep the extensive reading of the cases themselves either because they were not readily available or because an attorney preferred to use a shortcut, *and* those lawyers who used the treatise as a cartographic guide to wend their way while consulting an ever-expanding body of cases. Legal treatises proved popular where other sources of law proved scarce. The westward expansion of the United States led to few lawyers in frontier territories having access to entire sets of case books, bolstering the importance of treatises. Instead of reading the actual cases, sagebrush attorneys had to rely upon cited decisions in burgeoning treatise footnotes. Yet it might equally be true that treatises were part of the array of books that lined the shelves of established Eastern lawyers as status symbols. Literary scholar Leah Price reminds us that books have many functions beyond the transfer of the information contained between their covers—and providing an imprimatur of expert status is not the least among them. Advertisements from the nineteenth century are reminders of this status function. They often promote the expertise of the author within the field.

The legal treatise, which earlier was careful to gesture toward the authority of courts and to identify its own role as merely organizing, increasingly came to assume an independent mantle of authority. Indeed, it served as the quintessential form of creative legal literature rather than periodicals. Not until the 1885 launching of the *Law Quarterly Review* was there a major journal to publish new insights. The casebook only emerged under the auspices of Harvard Law School's Christopher Columbus Langdell during the 1870s. Pound describes the casebook as the "necessary forerunner … of the great treatises."[22] The competing authority of academic literary production—casebooks and legal periodical literature—presumably prodded treatise authors to offer an alternative form addressed particularly to the practicing bar. Treatises might be written by hacks as well as by talented jurists. Regardless of their quality, the mid-century vertiginous multiplying of editions served as harbingers for the magisterial treatises that emerged by the end of the nineteenth century.

Represented by Samuel Williston, John Henry Wigmore, Austin Wakeman Scott, and Arthur Corbin, this period might be called the silver age of treatises. These were sometimes published—as in the case of Williston and Wigmore—*after* they compiled their casebooks. What was most salient about the late nineteenth-century and early twentieth-century silver age treatises was how many of the preeminent specimens were authored by law professors. Williston and Scott taught at Harvard Law School, Wigmore at Northwestern, and Corbin at Yale. Treatise writing was yoked to the norms of the law academy—in terms of both quality and engagement with law reform projects—and it is not surprising that works composed by authors at leading law schools obtained what Weber might characterize as charismatic authority. Their intended readership was decidedly upmarket. The treatise which had begun in the United States with Story's scribbling at the periphery of the common law domain had established by the end of the nineteenth century its own sense of being at the very heartland of the enterprise of fixing law. Silver age works, nevertheless, could be tarnished by the commonplace prejudices of their times. For example, Wigmore warned courts about young women who might p. 698 ↳ fabricate rape charges since as a class they were prone "to the narration of imaginary sex-incidents."[23]

Authority, of course, might be used to push law in a given direction. Fernandez and Dubber describe the way treatises embody an aspirational impulse toward law as it *should* be. Yet the directing voice of the legal treatise might be conservative as well as embracing progressive reform. Thomas M. Cooley, a Chief Justice of the Michigan Supreme Court with close ties to railroad interests, published a highly influential *Treatise on the Constitutional Limitations* (1868) that warned legislators against regulating corporations and markets. Christopher Tiedeman's *A Treatise on the Limitations of Police Power* (1886) argued for even a greater circumscribing of legal attempts to further the people's welfare, as it was known, through previously accepted legal mechanisms.

Of course, it is ironic that the legal treatise, which was designed to present an objective summation of binding law, increasingly turned into a battleground over competing notions of law's direction. Joseph Henry Beale's *Treatise on Conflict of Laws* (1916) underscores how far the production of treatises as an academic cottage industry had progressed. Instead of the table of cases found at the beginning of so many legal treatises, Beale lists a bibliography. He provides how-to instructions for attorneys in the field on building a private library. And, finally, he identifies the earlier treatise on the subject by Story as the pivotal "psychological moment" which allowed the architects of conflict of law to shift from statutory construction to more systematic analysis within a treatise tradition.[24] Beale would later be attacked by legal realists for failing to grasp his own "psychological moment" where his mechanistic insistence on the trumping power of territoriality in conflict of laws would be challenged by courts.

It is hard to imagine Corbin's treatise on contracts without Williston's—and vice versa. Lawrence Friedman has described Williston's contracts treatise (1920–1922) as a "monumental fortress … fully armored against the intrusion of any ethical, economic, or social notions whatsoever."[25] Corbin's work was Yale Law School's legal realism retort against Williston's Harvard hidebound formalism. In the first decades of the twentieth century, Corbin introduced into Yale Law School the case method propounded by Christopher Columbus Langdell at Harvard Law School. On one hand, casebooks established a (not always accurate) picture of a cohesive national law extending through courts across many jurisdictions. Emerging in the aftermath of the Civil War and sectional conflict, they provided an intellectual infrastructure that crossed state boundary lines. On the other hand, even canonical cases fragmented law into decisions issued by individual courts. Nevertheless, Corbin's treatise masterpiece, *Corbin on Contract*, eschewed Williston's task of taking the vast corpus of contracts cases and transforming them into a set number of unifying rules.

Every legal principle set down in a treatise, he argued, is simply a working rule, until it is tried against actual p. 699 circumstances in a judicial ↳ setting.[26] Challenging existing rules, he often raises issues of public policy. Corbin, for example, wonders as a thought experiment what it would be like to be rid of the requirement for consideration.[27] He developed the equitable principle of a reliance interest. Complexity undercuts the capacity of the legal treatise to construct a summation of a legal field—and therefore highlights how every treatise is by definition transitory.

What is *Corbin on Contracts*? Is it the zenith of treatise writing in the silver age when academic authors were able to appreciate the problematic nature of their topic? Or was it a subversive text that slipped into the subject an overwhelming sense that everything was written on sand? It was as if common law contract doctrine was a vast palace designed for Ozymandias. Corbin's enduring influence can be seen in the Uniform Commercial Code, most notably in Karl Llewellyn's contributions, and in the Second Restatement of Contracts. Was, then, the treatise an evolutionary link toward the legal realist restatement project? Or was the restatement simply a treatise in disguise?[28] As Fernandez and Dubber remark, it is useful to think about the American Law Institute's unofficial constructions of a coherent US law, such as the Model Penal Code (1952–1962), as treatises in their fields.

By the late 1930s, the silver age of treatise writing was appearing a bit tarnished. In 1939, Harvard Law School Professor Austin Wakeman Scott wrote a classic four-volume treatise on the *Law of Trusts*. Yet on closer inspection every one of the section headings followed precisely the nomenclature and order of the American Law Institute's Restatement of Trusts. This may not be surprising since Scott was a Reporter for the Restatement. But it does mean that *Scott on Trust* has the uncanny impression of simply providing case citations with an index (prepared by Erwin Griswold who ultimately would become Harvard Law School's Dean and later Solicitor General). Moreover, the American Law Institute origins of the treatise transform Scott's authorial role into what he calls "combined judgment," an early form of crowd-sourcing, as opposed to the production of a philosopher or poet who does his work in "lonely silence." Yet most remarkable is what might be called the postmodernist gesture in the treatise's epilogue: there is no actual American common law of trusts—but only an envisioned representation of the law "as I understand it."[29]

Roscoe Pound's clarion call for utilitarian sociological jurisprudence grounded less in precedent and more on immediate outcomes was not launched as a direct attack on the courts. Instead, legal thinking—especially treatises—served as the proxy object of his attack. In a seminal 1928 article, Wesley Sturges and Samuel O. Clark wrote a devastating critique of treatises by showing how mortgage law is incoherently presented in the treatise literature through comparing one real property treatise with another. Jerome Frank, Yale legal realist acolyte and Second Circuit judge, agreed that legal prose had taken on the quality of p. 700 fantasy writing: "On close examination, our legal concepts often resemble ↳ the necks of flamingos in Alice in Wonderland which failed to remain sufficiently rigid to be used effectively as mallets by the croquet players."[30] By the time Richard Powell, a noted law professor at Columbia Law School, wrote his treatise on real property law (1949–1953), a reviewer wondered why he had bothered. Treatise writing has largely been relegated as an enterprise to the faculty of second-tier law schools.

38.3 The Treatise in an Age of Digital Reproduction

Much of our discussion has focused upon the rise and fall of the legal treatise as a genre. But such a Gibbonian question is as problematic as the definitional one. This chapter has traced a chronological arc describing how the treatise emerged to claim a significant investment of intellectual capital from practicing lawyers and legal academics—and how, ultimately, the treatise was sidelined by legal realism. Yet an alternative narrative might be constructed. Although Simpson linked treatise writing to the common law tradition, it must be noted that the treatise has been reinvented as compatible with natural law, positivism, and legal realism. Indeed, it would be surprising in a story about the treatise within its genre ecosystem if this literary form was incapable of adapting to an ever-shifting doctrinal environment.

The legal treatise has a past. But does it have a future? As an instrument of reform it is displaced by NGO reports. As a quarry for case law, electronic databases such as Westlaw or Lexis are more thorough and up to date. As a principled reading of common law, the fractured nature of an instrumentalist legalism—from the superfluity of administrative agency rules to international norms—makes the idea of focusing on legal opinions quaintly old-fashioned. Its underpinnings have been undercut. Precedent, doctrinal coherence, and displays of professional erudition are falling out of favor, and are being displaced by what might be called fact-based jurisprudence.

In short, the treatise genre is a folded paper road map in the GPS age. Yet it might be premature to write the treatise's obituary. Sorting an overabundance of electronically available cases demands a cartographic instrument. There nevertheless remains a need to perfect methods for organizing information so attorneys and judges are not simply intellectual magpies raiding various nests to find snippets that further their cases whether or not they comport with the main currents of legal doctrine. To borrow a phrase from historian of information Ann Blair, there is simply "too much to know." The legal treatise might be reborn in a digital form. Such a sorting device for legal materials might not look like a traditional treatise. It might serve the core objective of systematizing untidy legal sources within a framework of principles. The digital age is also p. 701 the age of curatorship. But quite possibly this new incarnation of the treatise would be more like ↳ a search engine on stilts—an instrument deployed for the moment—and lose much of its claim to embody legal authority or reputational prestige (*auctoritas*).

Given this narrative of the rise, fall, and possible Phoenix-like rise again of a genre for ordering legal materials, we should revisit the issue of the treatise's role as a genre. The historical debates over the significance of the legal treatise are similar to the Buddhist parable of the blind men and the elephant where everyone understands only a part of the creature. Simpson sees the genre as a whole, failing to understand the particular choices in material that make each treatise its own rhetorical statement. There is some truth to Simpson's contention that "certain literary forms are closely tied to theories about the nature of law itself, and that this is particularly true of the treatise."[31] Constructed out of the building blocks of judicial cases, common law especially demands an organizing genre such as the treatise. Yet Simpson's claim is overstated. The treatise does exist in other legal systems. International law, for example, requires a bridging genre to render coherent otherwise disparate national norms.

Horwitz focuses upon the treatise as a crystallization of doctrine useful for legal historians. He ignores, as Tomlins points out, the treatise as its own rhetorical literary form. As a site for the production of legal knowledge the form of the treatise is shifting, chimeric, and responsive to both the legal genre ecosystem and the context of their own times. Fernandez and Dubber identify the way treatises might be aspirational—a vehicle for reforming law—as well as a summary of existing legal knowledge. However, they do not acknowledge the ways that treatises also resist change.

Tomlins points out the many motives for writing such as "desires for income, career advancement, [and] professional jealousy."[32] He shows how aesthetic considerations and political power are brought to bear in treatises to make them into legal technologies. But Tomlins presumes a conscious instrumentalism that might not always be pervasive in the midst of producing these texts. Whether we believe him or not, for example, John Chipman Gray's *Rule Against Perpetuities* (1886) urges ignoring utilitarian considerations in writing treatises. Gray saw the task of writing about "the great departments of the law" as ultimately allowing the construction of a corpus juris for American law. The Blackstonian conceit that law is a science might actually have been believed by some treatise authors.

The argument in this chapter is that the legal treatise is a fraught, unstable genre. While its claims to authority rest upon the hubris of seeing itself as the *summa* of common law cases, the treatise teeters on the edge of obsolescence. All the pocket parts (developed by the Edward Thompson publishing house after the Civil War), supplements, and endless new editions cannot prevent a treatise from slipping behind the ideal of being up to date.

Indeed, the treatise as a genre is crammed with so many contradictions. Some of these are inherent to the problem of seeking to become an all-encompassing source of law. Some come from the plethora of treatises that take different approaches toward their subject. But the result is the same: the treatise embodies p. 702 Pushmi-Pullyu ↳ jurisprudence—a set of contradictory positions that like Doctor Doolittle's creature tug in opposite directions.

The authorial voice seeks to be objective. But the author himself or herself must constantly trumpet expertise. It claims to describe law *as it is*, though slyly inserting nudges to law *as it should be*. How can the genre balance its task of restating law with a very different goal of reforming legal norms? The treatise, especially from the time of Story, was considered critical to the enterprise of constructing a national jurisprudence erected on a common law foundation. Yet so often treatises include gestures—greater than those found in court opinions—toward comparative and natural law sources. The treatise valorizes the positive law of legal cases even as it begins to assume the mantle of its own legal authority. Often, the legal treatise begins with an introduction grounding the topic in an historical narrative. Such treatises place themselves at the end of history like the last stop on a train line. Yet it is clear that the legal principles so elegantly constructed in a treatise will not survive unscathed over time. In the end, every treatise will end up being an historical artefact like the treatises of Story, an emblem of rigidity like Williston, or an object of mockery like Beale's. History is a very dangerous place to be a treatise. But the greatest irony of all is that the legal treatise seems oblivious to its own ironies.

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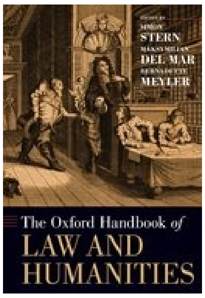

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CHAPTER

39 Legal Codes as Cultural Products

Heikki Pihlajamäki

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Abstract

Legal codes have served multiple purposes. From early on, they have served as symbols of power, drawing their legitimacy from ancient roots. When observed historically, the practical importance of the codes has often been meager. Although the symbolic significance of the codes has never disappeared, from the nineteenth century onward their importance for practical legal life has been undisputable. The traditional view of looking at the codification history through the lens of nineteenth-century history of continental law is, however, in many ways misleading and in need of revision. Codes need to be considered in the context of other forms of normativity, such as normative ethics, as cultural products, and as export products.

Keywords: codification, legal history, nationalism, France, Sweden, legal modernization, Middle Ages, nineteenth century, Code Civil, Germanic codes

Subject: Jurisprudence and Philosophy of Law, Law and Society, Law

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39.1 Introduction: The Traditional Approach and Its Problems

FOR decades, codifications have been an important topic in international legal historical research. The great codifications such as the Prussian, French, Austrian, and German civil codes have been seen as a central phenomenon of nineteenth-century legal history. This approach, however, is desperately outdated and has little to give for today's legal research—for four reasons.

First, the traditional codification-centered research represents an old-fashioned, nationally oriented approach, which looks at the European and even global development through the lenses of major European states, typically France or Germany. It often either neglects all fringe areas (such as Eastern Europe or the Nordic countries) or gives their histories little or no attention. When these histories differ from those of the major countries, the histories tend to be treated as anomalies or exceptions that do not change the main rule. This is a general problem in much of the traditional legal history. Indeed, questioning traditional codification history may have fatal consequences for traditional European legal history as a whole.

Second, the traditional emphasis on the late eighteenth- and nineteenth-century codifications excludes earlier codes, such as the Constitution of Electoral Saxony (1572) and early modern Nordic codes (the Swedish, Danish, and Norwegian Laws of the Realm, of 1734, 1683, and 1686, respectively).[1] The reason p. 704 behind the common exclusion ↳ is that only the "mature" codifications, supposedly, were based on a scientific system, and meant as comprehensive and exclusive. The Swedish Law of the Realm, however, claimed comprehensiveness and exclusivity as well; on the other hand, nineteenth-century codes never managed to monopolize the field of legal sources anywhere. Other legal sources—such as legal practice, *travaux préparatoires*, and scholarship—always came to fill the unavoidable lacunae and interpretative needs.

Furthermore, normativity beyond codifications and written statutes in general merits consideration. Normative ethics—that is, a body of rules developed by theologians—occupied a major role in the whole of normativity in the Middle Ages and in the early modern period, as Wim Decock has recently demonstrated for contract law.[2] Paolo Prodi then, has magnificently described the gradual erosion of normative ethics toward the end of the early modern period, and the substitution of ethics for law.[3] This process created the present situation with hardly any all-encompassing ethical rules. Again, Prodi's story suits well the heartlands of Continental Europe, but less so the Nordic and the Eastern regions. Normative ethics as a clearly defined body of rules never developed in Scandinavia, or was at least replaced by legal norms earlier than in the more southern parts of Europe. In an earlier work, I have described how a Swedish "pre-positivism" emerged this way.[4]

Third, codifications and other forms of normativity are cultural products and need to be viewed in that context as well. The nineteenth-century codification movement, rightly so, has often been linked to nationalism. Codification was now one of the instruments with which national unity was created much like the national flag and the national anthem. This has been the case not only for the French *Code Civil* but also just as much for the Italian (1865), German (1900), and Dutch codes (1938). The codes enacted in the new republics born out of the collapse of the Soviet Union, and those of the ex-socialist republics, demonstrate a highly symbolic value for the newly found national unity. However, in the Nordic countries, already the early modern codes fulfilled the function of national symbols, which presumably lessened the need for "modern" codifications. Nationalism could also lead to non-codification. Catalonia is an example of this. Catalonia did not codify its civil code until 1960, preferring to stick to its local customary law with the Spanish civil code as subsidiary law. Instead, the Catalonian customary law became the carrier of nationalistic sentiments.[5]

p. 705 Fourth, scholars have not given enough attention to European codifications as export products. In the nineteenth and twentieth centuries, the great European codes—the French and German civil codes, most notably—spread to all other continents, Australia excluded. A notable exception from the scholarly lack of interest in this problem is Jean-Louis Halpérin, who has recently explained how the Western concept of law has been exported to other continents, and how, using the Roman law frame, social and customary rules have been transformed into laws.[6] Codes as the main outcome of continental nineteenth-century legal formalism have often served as a yardstick to measure the legal nature of normative orders of non-European regions as well. Interestingly, however, scholars of customary law have at least since the early 1960s felt uneasy about recording—in fact, codifying—African customary laws.[7] If modern legal history strives for global significance, these questions must receive more attention.

Many see the spread of Western codes as a form of cultural colonization, as Western laws often go together with Western economic influence. Western values are based on individualism, which has its roots in Roman law and the Enlightenment, and individualism easily gets into conflict with Asian and African collective values. This need not, however, be the only interpretation. Western codes also carry with themselves the idea of liberal human rights, which, according to critical voices, is a form of cultural colonization as well.[8] There are, however, other ways of looking at this, as it may also be the case that Asians and Africans feel that they benefit from Western-originated rights and freedoms. Furthermore, one may question the assumption that Western rights and freedoms are only Western or any more just Western in the first place.[9]

However, the problem is not only about whether Western law colonized other continents. It is also about cultural misrepresentations: looking toward the East and the South through Western lenses. The discussion started with Edward W. Said and his classic idea of "Orientalism," which denotes "subtle and persistent Eurocentric prejudice against Arab-Islamic peoples and their culture." In Said's thinking, Western-created cultural representations of the East portray Asia, the Middle East, and North Africa as a fictional, sometimes romanticized "Orient," which dominates the Western discourses on the subject.[10] Said's Orientalism serves as inspiration to Teemu Ruskola's concept of "Legal Orientalism," which refers to the way European thinkers, starting from giants such as Montesquieu, Hegel, Marx, and Weber, have "affirmed the superiority of Western civilization of law."[11] Traditionally, the Chinese normative ↳ world—as a kind of "non-law"—has been portrayed as the irrational opposite to Europe's rational law. However, it has been shown that this picture tells more about the nineteenth-century European law than Chinese normativity as a whole. It has also been shown that the decision-making at Chinese courts was not "substantially irrational"—as Max Weber claimed—but in fact rather bound by written law—thus, in Weber's terminology, "formally rational." Another example comes from international law, whose traditional histories, created from the 1860s onward, have been profoundly Euro-centered.[12]

The nineteenth-century European code, then, has been the lens through which much of global history has traditionally been viewed. The concept of codification has enabled legal historians to judge pre-nineteenth-century European legal orders as "not-yet" or "not-really" codified, and the same has applied to those nineteenth-century legal orders, which have not been codified according to the model of the dominant European nations. The model of European nineteenth-century law has helped to place non-European normative orders, such as Far Eastern ones, outside the domain of law and to qualify them as irrational. The idea of codification continues to represent, for many, "true law," which partly explains the attempts, some successful and some failed, to codify law in different parts of the worlds and on different levels of the pluralist global law. Examples range from the strivings to codify European civil law to "new" *lex mercatoria* and international law. Capturing the fast-changing law, which appears and emerges in different degrees and modes of normativity (from moral to customary rules and to "hard" legal rules), into a code has often proved difficult and largely lost its popularity. The "creeping codification of the new *lex mercatoria*," for instance, differs in many ways from traditional codification: it cannot serve as the sole basis of decision-making in international commercial disputes.[13]

This chapter addresses these four problems of traditional research and then advances to present the phenomenon in a fuller transnational, cultural context. First, traditional presentations of European legal history culminate in the German nineteenth-century conceptual jurisprudence and its master accomplishment, the Civil Code of 1900. However, the traditional presentations pay little or no attention to the fringe areas of European legal culture, which distorts the view of European legal history (Section 39.2). Section 39.3 criticizes the traditional, Weberian conception of codification as the foremost driver and instrument of legal modernization. Section 39.4, then, questions the traditional way of excluding law codes other than classical, nineteenth-century codifications from the concept. Section 39.5 discusses the use of legal codes as symbols and instruments of government and legal practice. Section 39.6 concludes the essential findings and briefly presents some new research questions.

39.2 The Emphasis on European Heartlands

Douglas Osler has talked about "a myth of European legal history." Traditionally, textbooks of legal history have been based selectively on such pieces, which best support the culmination of European legal history in the glorious nineteenth-century German law and especially the German Civil Code of 1900. The selection begins with Roman and Italian legal history, which dominates the scene until the end of the Middle Ages. The emphasis then shifts to Humanism, first in France and then in the Netherlands. After that begins the era of the Historical School and Pandectism, which ultimately leads to the Civil Code.[14]

The traditional codification-centered approach represents an old-fashioned, nationally oriented research, which looks at the European and even global development through the lenses of major European states. The traditional story that Osler depicts often either neglects all fringe areas or gives their histories little or no attention. They have no place in the story, which is constructed—and I think Osler is right here—with the German Civil Code of 1900 as its focal point and culmination. The traditional story thus distorts not only the codification history itself but the whole legal history of the continent.[15]

What are these neglected fringe areas? To start with, the vast regions of Eastern Europe are usually left out of the story. Naturally enough, they do not form one culturally definable area but instead several. Russia, Ukraine, and Belo-Russia form a region, which was relatively little influenced by learned laws—Roman and Canon—until the nineteenth century. Yet concentrating on the effect of learned laws is precisely the kind of legal history writing which departs from the standards supporting the Oslerian "myth." Looking at Russian legal history on its own terms, modern research has shown, for instance, that Russian peasant courts of the early modern period, and even the early twentieth century, relied on written legal sources to a high degree.[16] This is a completely different picture that challenges the view that many would intuitively hold of Russia ↳ as a kind of "Other" and "completely" different from the West. In this respect, the traditional picture of Russia seems as distorted as Edward Said and Teemu Ruskola have shown the image of China to be. We will return to Russia's complicated nineteenth-century codification history later.

In certain respects, Russian legal history resembles another neglected area, which is Scandinavia, or the Nordic region.[17] As in Russia, so also in Scandinavia, the influence of learned bodies of law was relatively modest all through the early modern period. This does not, however, mean that the Nordic region would have constituted a legal void. As in Russia, Scandinavian courts relied surprisingly much on written law as a source of law from an early point on. Denmark, Norway, and Sweden all had provincial and (with the exception of Denmark) also realm-wide legislation already in the Middle Ages.[18] In the early modern period, new realm-wide laws were issued in all three countries: the Danish Law (*Danske Lov*) in 1683, the Norwegian Law (*Norske Lov*) in 1686, and the Swedish Law of the Realm in 1734.[19] I will later return to the question of whether these can be considered codifications.

This is not the place to patch up systematically all the blank spots of traditional European histories. Suffice it to mention that many other areas of Eastern Europe (such as Poland, Hungary, and Croatia) followed the core European *ius commune* route more closely than the Nordic region and Russia.[20] The examples of Russia and Scandinavia are, however, important because they shed a different light on the history of codification and written law. They are, as mentioned in section 39.1, examples of "pre-positivism." They offer examples of legal orders, which written law dominated surprisingly early. For the history of codification, this is significant.

39.3 Legal Codes and the Problem of Legal Modernization

The centeredness on European heartlands is not the only problem related to legal codes. The second has to do with modernization. Once we get over the hurdle of defining this notoriously difficult concept, the question that needs to be asked is how much did the classical (meaning nineteenth- and twentieth-century) codifications contribute to ↳ modernization. How necessary or useful were they, and how did they p. 709 sometimes perhaps even hinder modernizing processes? If codifications have been crucial to legal and social modernization, how is it possible that such large tracts of the globe (such as the common-law world and Scandinavia) have been able to go through these processes perfectly well without codifications? Should we pay attention to different degrees and ways of codifying normative material (field codes, partial codifications, systematization of case law)?

A brief introduction to the concept of modernization is first needed. After World War II, a theory of modernity based on Weberian premises became a popular way of understanding social change globally. This traditional understanding of modernization relied heavily on law-related elements such as rational bureaucracy, secularization, legal positivism, the legal profession, the rule of law, industrial capitalism, democracy, and human rights. The assumption seemed to be that this Weberian paradigm could be easily adapted to a broader and more global perspective, as well. After the positive tones of the post-war era, this traditional way of understanding modernization has, however, become less convincing. It is one of the main *bêtes noires* of critics such as Dipesh Chakrabarty[21] attacking the concept's Eurocentrism because of its undeniable roots in European history and philosophy. Indeed, the traditional narrative of legal modernization is suspect on two accounts: both as a historical narrative and as a description of the contemporary world.

As a historical narrative, the traditional understanding of modernization is unconvincing because it automatically assumes a certain connection between elements that supposedly belong together. The ideal type of legal modernity, consisting of components such as rational bureaucracy, secularization, and legal positivism, is historically speaking unrepresentative of global regions other than the European heartland. As Ugo Mattei has shown, modernizing elements may well dominate some parts of a legal order while being completely absent in others.[22] The legal order may well be to a large extent modern in the traditional sense of the term while the political system is profoundly undemocratic—contemporary Russia being a case in point. On the other hand, many central features of modern law date further back in history than the nineteenth century. Depending on where we place the decisive "revolutions" of law, the crucial ruptures can be found either/and in the late Middle Ages,[23] the Reformation era,[24] or the formation of the modern state in the seventeenth and eighteenth centuries.[25] Of course, the Weberian modernization scheme does not take p. 710 into account post-war transformations ↳ such as federative tendencies (of which the European Union is a prime example) or the impact of international law in a globalized world.[26] Closely linked to the growth of industrial capitalism in the nineteenth and twentieth centuries, the traditional notion of modernization may offer little help in trying to understand a "post-capitalist,"[27] data-driven economy and its systemic demands.

The European and Western bias of the traditional understanding of modernization is obvious: the less we have to do with the industrialized West, the weaker the explanatory power of the traditional Weberian model becomes. The historical narrative of legal modernization, based on continental (especially German) legal history, fails to explain many legal changes at the fringes of the Western world (such as Eastern Europe, the Nordic countries, and Latin America), not to mention Africa and Asia. This is a problem with some recent historical accounts, as well. The relationship between religion and legal modernization is an issue of utmost importance in world politics today, and it requires explanation as countries at very different levels of secularization have, nonetheless, undergone similar extensive legal changes since the late nineteenth century. To quote Teemu Ruskola, "the relationship between [non-Western legal traditions] and modernity cannot be simply a one-sided affair, with the West providing the blueprint for a modern legal order and [other parts of the world] merely executing it." As Ruskola shows, Chinese corporate law, for instance, not merely reflects the Western public-private dichotomy but also transcends it combining aspects of Confucianism, socialism, and liberalism.[28]

The traditional narrative of modernization is equally flawed as a description of the contemporary legal world. The "postmodern" understanding of law was already a fundamental blow. The postmodern mind had shifted the focus of legal analysis away from modern law understood as a unitary system isolated from other facets of culture and society. Law is, then, fundamentally pluralistic with "minor jurisprudences" as different forms of legal knowledge competing with the traditional modernist notion of a unitary system of law.[29] The theoretical premises of this pluralistic view of a global legal world were further elaborated by Brian Tamanaha[30] from a sociolegal perspective, by William Twining[31] as a renewed understanding of a global jurisprudence, and most lately by Hans Lindahl as a phenomenology of what he calls the "a-legal."[32]

This narrative is also hopelessly attached to the nation state. It presupposes a legal order that emanates from a nation state and is enforced within its territory while an international legal order would then consist p. 711 of public international law and the ↳ choice-of-law rules of private international law. For the past decades, the traditional picture of modern law has become even less apt to describe law as a global phenomenon. Transnational law in its different guises (new *lex mercatoria*, international sports law, transnational administrative law, soft law, voluntary standards, etc.) does not fit the traditional description, and even the concept of transnational law itself remains obscure.[33]

At the same time, legal modernization has a political side to it. Arguably, some of the traditional core elements and values of modernization and modern law and society have recently been jeopardized on a massive scale. These include notions such as rational bureaucracy (deregulation frenzy, sidestepping legal processes), secularization (the return of religion on many fronts), legal positivism (governance methods and technologies, regulation with coded architecture), the legal profession (engineers as judges in the Unitary Patent Court, algorithmic decision-making), the rule of law (Russia, Poland, Hungary, the return of geo- and power-politics on the international level), liberal democracy (populism, authoritarianism, anti-EU movements, nationalism, distortion of the networked communications), and human rights (UK, Russia, USA, the refugee question in EU countries). Some scholars have argued that in the current political climate and turbulent times, scholarship should defend, adapt to new circumstances, and develop further many of the values of modernization, not tear them apart and participate in denying their meaning and credibility.[34]

However, while the traditional Weberian theory of legal modernization has lost much of its credibility, critics have offered little in exchange. Instead, they have either limited themselves to particular new features of contemporary law (e.g., different forms of transnational law) or, refusing to build "grand theories," explained the prevailing situation as a form of unstructured legal pluralism. Although there are remarkable works on global law from contemporary sociolegal (Tamanaha, Twining) or theoretical perspectives (Lindahl), no single theory has emerged which would help to understand the main features of global legal development in historical perspective at the same time. To remedy this explanatory deficit, what is needed is a theory that would depart from the traditional premises of the nation state and positive law but include them in its explanatory apparatus at the same—and do all this in a historically accurate way.

It is now time to link back to codification. Already for Weber himself, the link was obvious. The French Civil Code represented for him the first legislative product, which was both formally and materially rational. In other words, the Civil Code stood at the highest level of development: "As a product of national legislation, the Code Civil has become the third of the world's three great systems of law, alongside Anglo-Saxon law, a p. 712 product of juristic practice, and the Roman common law, a product of theoretical-literary ↳ juristic doctrine. It has also become the foundation of the vast majority of eastern and central European codifications."[35]

Following Weber, standard legal historical narratives have taken the nineteenth-century codes as motors of legal modernization. If one were to choose only one legal phenomenon as the symbol of legal modernization, it could well be the civil code. A leading European legal historian recognizes “in the code the road to the modernization of civil law.” The code, he claims, brought about “an epochal turn in European legal history.”[36] The civil codes, the story goes, contributed to the modernization of private law; in other words, they solved the fundamental antagonism between universally oriented and national legal systems, customary and statutory law, public and private law, non-dispositive and dispositive law, segmented and general legal capacity, and divided and absolute ownership of land. Codifications have been depicted as an important part of the “civilian’s contemporary epistemological construct”; part of her or his *mentalité*. The civilian thus “reasons from the social and legal perspective embodied *in the code*.” However, it is doubtful whether private law codification is such an indispensable part, almost a *conditio sine qua non*, of legal modernization as it is often portrayed. Law changed rapidly to meet new needs—or to steer the course of social transformation—at the same time and in the same way in those parts of the Western world in which private law was not codified, such as the common-law world and Scandinavia. This leads a comparative legal historian to wonder whether there may be an explanation that unites the legal history of the regions in which other forms of normativity than codification prevailed—such as piecemeal statutes and regulations, or case law—with those that codified their private laws. How does the rise of regulatory law from the late nineteenth century onward relate to this?[37]

39.4 The Problem of Periodization

The third problem of the traditional scholarship is its concentration on the classical, nineteenth-century codifications of private law. This problem is, obviously, also related to the Weberian conception of the nineteenth-century continental (French and German) law as the zenith of global legal development.

Weber himself, as stated in section 39.3, draws a clear line between “pre-revolutionary” codes on the one hand, and the Code Civil and later codes on the other. In his highly influential *History of Private Law in Europe*, Franz Wieacker follows this scheme, which then becomes the standard way to describe codification p. 713 history. The true “codes” ↳ have been set apart from mere “compilations” of the earlier times (such as those of Hammurabi and Justinian, but also early modern law books such as the Danish Law of Realm of 1683 or the Swedish Law of the Realm of 1734). The reasons to exclude the older ones are that they were not based on systematics developed by legal scholarship in the same way that the classical codifications were based on the *Pandektenwissenschaft*, and that the older ones did not claim exclusivity over other legal sources the way the classical codifications did.

However, older codes have also claimed exclusivity. Justinian’s *Corpus* was already meant to be the only legal source, wiping out all others. The same was true for the Constitutions of Melfi, law promulgated in 1231 for the Kingdom of Sicily by Emperor Frederick II. All major Nordic Codes also claimed exclusivity over other legal sources. Obviously, none of them succeeded in establishing themselves as exclusive legal sources. Jurists continued commenting on the law books both in Justinian’s Byzantium and Frederick’s Sicily, as well as in the Nordic countries. As time went by, new legislation also appeared everywhere. Courts developed their own practice.

However, the bourgeois codes did not succeed any better in establishing their exclusivity. Although the *Code Civil* caused French legal scholarship to develop into what many perceived as a boring *école d’éxegèse*, the exegetical school solely involved in interpreting the Civil Code, toward the end of the nineteenth century the French legal scholarship was emerging as creative and productive again. The German Civil Code established a strict principle of *pacta sunt servanda,* “promises shall be kept,” which left no room for many legal institutions that the German *gemeines Recht* had entailed. The highest court of the Empire and the Weimar

Republic, *Reichsgericht*, reintroduced many of them soon after the promulgation of the Civil Code in 1900. The best-known example is the "Steam Price Case" (*Dampfpreisfall*), as a result of which the *Reichsgericht*—*contra legem*, against written law—again allowed for *clausula rebus sic stantibus*. With origins in medieval canon law, the *clausula* was an old *ius commune* institution of contract law. The *clausula* allowed parties to depart from a contract, if the circumstances prevalent at the time of the conclusion of the contract had drastically changed. This was the case in 1920, when the German *Reichsgericht* decided the Steam Price Case. As a result of the post-war inflation, the price of steam had risen enormously. For the Court, this was sufficient reason for bypassing the original contract clause regarding the price.[38]

As to the systematizing tendency behind the nineteenth-century codifications, this is partly true. On the other hand, it is not far-fetched to say that at least the early modern codes were also based on particular systematizing conceptions (influence of Ramistic philosophy, the model of the Decalogue, etc.).

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39.5 The Symbolic Value of Legal Codes

The fourth problem of the traditional codification research has to do with its lacking attention to cultural contexts. Apart from purely legal objectives, legal codifications have always served as symbols. They have helped to highlight the genius of their authors or of the lawgivers, and codifications have helped to build national identities in much the same way as national anthems, national literature, or national borders.

Legal codes probably carried symbolic significance quite early on. I will use Nordic medieval legislation to illustrate this. In Sweden (as in Denmark and Norway too), legislation began at the provincial level. Nine Swedish provincial laws still exist in manuscripts either partly (the chapter on the church of the law of Småland) or as a whole. These include the provincial laws of West Gothia (*Västergötland*), East Gothia (*Östgötalagen*), Småland (*Smålandslagen*), Gotland (*Gutalagen*), Uppland (*Upplandslagen*), Hälsingland (*Hälsingelagen*), Södermanland (*Södermannalagen*), Dalarna (*Dalalagen*), and Västmanland (*Västmannalagen*). It remains unclear when the first versions of the provincial laws were compiled, but the oldest, the Law of Western Gothia, probably dates to the 1220s. Some provincial laws are private compilations, while two of the Swedish provincial laws have a royal confirmation: the Law of Uppland (1296) and the Law of Södermanland (1327).[39]

Since provincial codes were so numerous, one might think that written law governed medieval Swedish society. This is, however, probably quite far from the truth. Law manuscripts were dear, and it is difficult to estimate how many courts of law even possessed a copy of the local provincial law. Anyway, most court members would not have been able to read. Medieval written laws, then, probably mirrored legal practice, but they hardly directed it. It is much more reasonable to assume that legal practice led the way. Jürgen Weitzel and Pia Letto-Vanamo have emphasized consensual decision-making as crucially important in medieval peasant communities, in which central power was weak.[40] When peasant communities gradually, during the early modern period, lost part of their control of the local courts, the importance of written law in everyday legal affairs possibly grew. This story, however, must remain outside the limits of this study.

If legal practice was more important than written law, why codify at all? This is where we come to the symbolic function of the codes. Fernanda Pirie has suggested that laws are not always primarily instruments of government at all. Instead, she claims that "we must pay attention to their ideological and symbolic aspects." Pirie's examples are from early medieval Europe and Tibet. According to Patrick Wormald, the Germanic ↳ laws were also attempts to impose Roman *civilitas* upon uncivilized barbarians. Germanic rulers—and later Charlemagne—saw themselves as followers of Roman emperors, whose primary tasks had included making laws. Therefore, medieval laws were in Latin and some of them—the Visigothic law is an example—were divided into twelve books, following the Law of the Twelve Tables.[41] According to Pirie, early medieval Germanic laws (including the Frankish *Lex Salica*, the Burgundian, Visigothic, Lombard, and

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Anglo-Saxon codes) consisted of "records of custom, statements of policy and records of judgments in a haphazard order."[42] Pirie refers also to Geoffrey MacCormack's studies on the legal history of China, where a clear continuation developed between the codes of the different dynasties. The code of the Tang dynasty (from the seventh to the tenth centuries) remained unchanged until the late thirteenth-century Sung dynasty. Many of the provisions of the Tang code then passed via Ming and Qing codes all the way to the twentieth century. Evidence shows that large parts of the codes were never applied in practice.[43] Similarly in Tibet, the Code of the Fifth Dalai Lama from the mid-seventeenth century remained unchanged until the twentieth century. Sumptuously produced copies were kept out of laymen's reach and sometimes ceremoniously consulted by judges.[44] Pirie's argument is that none of these laws—either Germanic, Chinese, or Tibetan—were practical instruments of government or justice. Instead, they represented governments with religious foundations or antecedents in great imperial civilizations. The actual legal disputes were resolved through other means, with a symbolic reference to the codes, at the most.[45]

It is probably not an exaggeration to say that the symbolic value of codes has been present always. The French Civil Code is an excellent example of this. Napoleon himself is famously reported to have said that Code was his finest accomplishment. The cultural prestige of the Civil Code is reflected in Stendhal's statement, according to which he read a passage of the Code every evening to keep his language in shape. In addition, of course, the Code's spread to a huge number of countries from Portugal to Paraguay cannot only be explained by French political dominance or the Code's superb legal qualities, but largely by the sheer prestige that its adoption brought even to foreign legislators. The hitherto failed attempts at creating a civil code for the European Union, ↳ which is desperately lacking well-working unified symbols, attests to the great symbolic power of the codes.

However, it would be a mistake to dismiss all codes as mere symbols of political power or cultural progress. Situations vary one from another, and this can already be seen in the Middle Ages. Some codes were, besides whatever symbolic value they might have carried, also instruments of governance. In the twelfth and thirteenth centuries, the canon law of the Catholic Church expanded rapidly. A major instrument of ecclesiastic regulation were papal bulls and decretals, in addition to which synods produced normative material as well. From early on, these laws were compiled. At first this occurred through private initiative, an example of which are the three collections of Ivo of Chartres around 1100 (*Tripartita, Decretum, Panormia*). Eventually, the Church took control of the collections and produced works such *Liber Extra* (1234). It is fair to assume that already the first compilations arose out of practical demand. This was the case certainly even more when the sheer amount of papal decretals skyrocketed. The Church, if anything, was a global community governed by law—"the first modern state" as Harold Berman aptly called it—and collections of law greatly helped in governing it.

It is well known that the church legislation attracted a true wave of putting customary law into writing all over Europe. Examples include the Saxon Mirror, *Coutumes de Beauvaisis*, and *Siete Partidas,* all from the thirteenth century. The example of church legislation was certainly an important factor in the background of Swedish medieval codes, not the least because leading local churchmen, together with native strongmen, were actively involved in the codification processes. However, it seems reasonable to presume that an important reason for codification of Swedish laws was to underline the role of both the church and the community leaders as cultural and political leaders.

A decisive turning point when codes definitely began to serve primarily other than symbolic functions was the nineteenth century. This was the century when legal positivism was developed on the European continent. Written law now became the supreme source of law, and in most countries, codes represented written law par excellence. Even though, as said, especially civil laws had important symbolic functions as prime representatives of national legal unity, they were certainly not symbols only. From the point of view of the power holders, codes were instruments of governance, and for legal practice, they were everyday work tools.

39.6 Conclusion: Codifying Contemporary Law

Legal codes have served multiple purposes. From early on, they have served as symbols of power, drawing their legitimacy from ancient roots. When observed historically, the practical importance of the codes has often been meager. Although the symbolic significance of the codes has never disappeared, from the nineteenth century onward ↳ their importance for practical legal life has been undisputable. Nevertheless, I hope to have been able to show that the traditional view of looking at the codification history through the lens of nineteenth-century history of continental law is in many ways misleading and in need of revision.

My interest in the historical developments is, however, far from antiquarian. Although I firmly believe in the importance of legal historical research as such, some historical studies directly relate to modern problems. The problem of codification is one of those, as forms of normativity continuously emerge in modern discussions on law and legal development. The European Civil Code has been a standard topic for the past two decades, and the discussion seems not to have ceased even despite the fact that the political chances of the code seem scarce. Other international instruments of civil law (UNCITRAL, CISG, Draft Common Law of Reference) are high up on the agenda, whenever international commercial law is debated. The debates often concern the relation of these codifying efforts to transnational law—be it of a free-floating kind, created by international merchants such as banks, or created by international organizations.

In order to come to grips with what is happening today and what may happen tomorrow, we should attempt better to understand the changing forms of normativity from the seventeenth century until today. Phenomena such as the substitution of statute law for religious and moral normativity, codification and non-codification, and transnational law and soft law should receive special attention. They should be understood as a whole. The cultural, political, and religious context of the different forms of law and normativity, and the impact of law on culture, politics, and religion should be of vital significance to future research.

Many interesting questions need answers which I have not been able to provide in this short piece. For instance, the following problems emerge: How did the early modern European codes differ from the nineteenth-century codifications? Why did some countries not codify their laws, while most did? How does the problem of different forms of normativity relate to legal modernization? Can we speak of a “rise and fall” of the codification? We should place the traditional story of codification based on European core countries into a larger picture of different normativities and into a comparative framework of larger Western and global context. Doing this, the existing *Stand der Lehre* on codification would probably be thoroughly revised, as it remains based on an antiquated conception of European legal history as the history of European core areas only, and on the nineteenth-century codifications as the center of scholarly attention and motor of modernization.

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17 The terms "Nordic region" and "Scandinavia" are, for the sake of simplicity, used here synonymously, comprising Denmark, Finland, Iceland, Norway, and Sweden.

18 See Mia Korpiola, "High and Late Medieval Scandinavia: Codified Vernacular Law and Learned Legal Influences," in *The Oxford Handbook of European Legal History*, ed. Pihlajamäki, Dubber, and Godfrey, 378–403.

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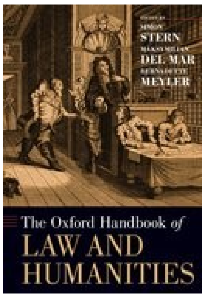

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CHAPTER

40 Form Contract

Tal Kastner

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Abstract

In light of the tendency to view contract through a lens of free will and agreement, this chapter approaches contract from the vantage point of standard form agreements. Drawing on empirical studies, behavioral psychology, law and economics contract scholarship, critical legal studies, legal history, and literary theory, it counters the prevailing view of standard terms as the exceptional case of contract. Through the lens of deconstruction, the chapter highlights the contextual contingency of standard form and refracts the presumptions in society and law concerning the allocation of resources. It identifies how the contemporary proliferation and routine enforcement of ancillary terms such as arbitration provisions in the current day epitomize how contract serves as a tool to leverage power. Examining form-contract scholarship and case law, the chapter reveals the expressive possibility of standard form in American law. It shows how the phenomenon of boilerplate exemplifies the process by which contract language serves to manifest agreement, shaping an understanding of freedom. The chapter extends the insights of legal history concerning the limits of contract freedom in the nineteenth century. In doing so, it draws on American literature to illustrate a changing paradigm of freedom—from wage labor to real estate development to consumption—and the attendant allocation of resources that shape voluntary exchange. By virtue of boilerplate's contextual contingency, this deconstructive perspective reveals the potential to redistribute resources through standard form contract, and thereby not only create value but shape social norms.

Keywords: contract, boilerplate, standard form, deconstruction, freedom, agreement, American literature, iterability

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IN American contract doctrine and scholarship, contract typically figures as a transaction among parties freely negotiating with each other. This paradigm envisions parties on a relatively level playing field negotiating to come to a mutually beneficial agreement of known and considered terms.[1] Reflecting a belief that private actors are best suited to determine their welfare-enhancing arrangements, the presumptive legal enforceability of contract terms presupposes knowledge and agency.[2] Even as contract doctrine has long explicitly disavowed a search for subjective intention in contract interpretation, the notion of a "meeting of minds" persists in case law rhetoric and in scholars' conceptual approaches.[3] Notwithstanding the tendency to view contract through a lens of will and agreement—and, in part, because of it—this chapter approaches contract from a different vantage point, that of the prevalence of standard or unoriginal form.

Empirical studies demonstrate the ways in which proliferating fine-print terms operate at odds from the paradigm of contract as a product of mutual understanding. Studies of "the most common type of economic contract"—so-called standard-form or boilerplate—indicate that consumers tend not to read terms,[4] which are getting longer and more pro-drafter,[5] and disclosure of terms proves largely ineffective in p. 720 promoting ↳ mutual understanding.[6] Though this suggests distinctive characteristics of standard form, behavioral research reveals the impact of social and legal context on parties' experience of contracting.[7] Empirical scholarship thereby calls attention to the interplay of context and text in the operation of contract terms, implicitly suggesting the dynamism of standard form.

This chapter examines this dynamic explicitly, countering the prevailing view of standard terms as an exceptional case of contract.[8] In doing so, it draws on a wide range of scholarship—from empirical studies, behavioral psychology, and law and economics contract scholarship to legal history and literary theory—and builds on the now widely recognized insights of critical legal scholars that structures of power shape legal norms.[9] Demonstrating the relevance of deconstructive theory, this chapter identifies standard form as an illuminating model of contractual expression that calls attention to the presumptive landscape of what is considered voluntary agreement.

In contrast to the focus in much critical legal scholarship on the indeterminacy of law,[10] this chapter uses deconstruction as a lens to refract the presumptions in society and law concerning the allocation of resources. In doing so, it considers the dynamic relation between contract law and social norms. A deconstructive perspective calls attention to the landscape that gives shape to the presumptions of contract and the substance of freedom. By virtue of its characterization as standard form, boilerplate illuminates its context. Thus, standard form helps us see what we take for granted in the operation of contract generally, as well as the allocation of resources through contract practice and doctrine. This dynamic changes in its particularity over time. In the current day, the contemporary proliferation and routine enforcement of ancillary terms such as arbitration provisions epitomize how contract serves as a tool to leverage power.

A collective view of form-contract scholarship reveals the expressive possibility and contingency of standard form in American law. Through literary theory and legal history, I show how the phenomenon of boilerplate exemplifies the process by which contract language serves to manifest agreement, shaping an understanding of freedom. Extending the insights of legal history concerning the limits of contract freedom p. 721 in the ↳ nineteenth century, I use literature to situate the operation of contract and the particular conception of freedom it reveals in different moments of American history. Literary texts illustrate a changing paradigm of freedom—from wage labor to real estate development to consumption—and the attendant allocation of resources that shape voluntary exchange. In addition, by virtue of boilerplate's contextual contingency, a deconstructive perspective reveals the potential to redistribute resources through standard-form contract, and thereby not only create value but shape social norms.

40.1 A Deconstructive Perspective

Upending the “determining center” that context purportedly offers,[11] a contract may “[take] dominion,” refracting the landscape of the parties.[12] In addition to allocating resources among parties, the paradigm of contract envisions relatively equal access to opportunity and power. It thereby at times elides structural baselines that impact the possibilities of agreement, a dynamic often associated with standard form. On closer examination, the category of “standard form” proves capacious and pervasive, shedding light on the operation of contract more broadly.

40.1.1 The Contextual Contingency of Standard Form

Judges routinely examine contract terms to ascertain parties’ intent, privileging bespoke terms as indications of agreement.[13] Yet, while “dickered for” terms ostensibly reflect intention and autonomy, shaping interpretations of contract, standard-form terms constitute the greater part of contracts and presumptively create enforceable obligations.[14] Indeed, the inclusion of provisions recognized as standard can help to inform courts’ understanding of the exchange as contractual.[15] In this way, the very form of contract—whether transactional formalities or boilerplate terms—resonates as an expression of intent.

The ideal of informed parties articulating a voluntary agreement subtly elides the iterative role of all language in manifesting mutual intent. Explicitly articulated terms operate in relation to implied terms—p. 722 themselves “a set of standard gap-filling ↳ assumptions.”[16] Similarly, “standard and unconventional forms of expression” may function together to undermine the signaling function of each.[17] Underscoring the contingency of the category of standard form, contract law itself has been identified as “one big form contract that goes unread by most parties most of the time.”[18]

40.1.2 Instantiating Iterability

In light of the contextual contingency of contract language, terms identified as “standard-form” provide an illuminating instantiation of iterability—the process by which meaning is produced through signs no longer tethered to a particular intentional origin.[19] Countering an understanding of expression as representing a pre-existing originary signified,[20] Jacques Derrida suggested a process of meaning-making in which “every sign … presupposes a certain absence.”[21] Thus there exists the possibility for each mark to be repeated and function meaningfully even if removed from its original context and “the ‘intention to communicate’ of the original maker of the mark.”[22] Citation, whereby any sign can “break with every given context,”[23] thereby serves as an exemplar of expression.

The impossibility of fully realizing an intention implicated in the notion of an absent speaker or addressee[24] resonates in the operation of contract. Tracing back to the nineteenth century, contract doctrine privileges “objective” manifestations of intent.[25] Law-and-economics scholarship observes that “contracts will inevitably be incomplete.”[26] The practice of “satisficing,” in which sophisticated parties choose to draft workable rather than precise terms to consummate a deal, underscores this insight.[27] At times, parties to a contract never achieve a holistic sense of the contents of a document manifesting their agreement, and attorneys may play a mediating role as drafters and negotiators.[28] In some cases, as in global derivatives p. 723 transactions, by compartmentalizing ↳ roles and information, the process of contractual documentation enables “pockets of lack of knowledge.”[29]

Potentially lacking a source of coherent authorial intent, contracts, especially those replete with boilerplate terms, exemplify the phenomenon of signification in which intention can never “actualize or fulfill itself,” because“[i]n no case will it be … totally present … to itself.”[30] Moreover, language shapes an understanding of its context and thus, in turn, opens up possibilities for the operation of the terms.[31] Not only do terms resonate and acquire value in pre-existing networks of meaning,[32] but “tensions between implied and express terms and between standard and unconventional forms of expression” complicate the articulation of “agreement” in a contractual form.[33]

The performative potential of expression emerges as a function of its inherent citationality, as does the dynamic relation between expression and context.[34] Contract, as a plan for future contingencies, not only imagines a changed context but also shapes parties’ relationship in the present.[35] Theorizing why sophisticated parties, for example, draft murky terms, scholars argue that resulting interpretive uncertainty functions as a bond between parties to avoid litigation.[36] Beyond its ability to entrench commitment, the form may impact intent in other ways, further illustrating the performative power of contractual expression. Recent behavioral studies suggest that the inclusion of terms in a recognizably contractual form shapes individuals’ sense of what is fair or binding.[37] Contracts also make salient the temporal dimension of rupture. Projected into a changed future, even negotiated or idiosyncratic terms can be seen as manifesting meaning in an attenuated way.

Displaying inherent qualities of contract language, standard-form terms epitomize the role of rupture as characteristic of communication.[38] The assertion that “[a] signifier is from the very beginning the possibility of its own repetition” underscores the paradigmatic operation of so-called boilerplate.[39]

“[R]eversing and displacing a conceptual order,”[40] a deconstructive perspective invites reconsideration of boilerplate as contract’s presumptively “parasitic” or etiolated form.[41] This process, in turn, further highlights the significance of the imagined framework of contract, the social context of American history and culture. Viewed as a vehicle of ↳ liberty, contract reveals the presumed landscape of resource allocation in American society. Before exploring this, the discussion in section 40.1.3. considers the expressive possibilities of standard terms.

40.1.3 Portability, Citationality, and Expressive Possibility

The etymological development of the term “boilerplate,” a colloquialism rather than a consistent legal category, illustrates the citationality that deconstruction envisions. A figure of portability and standardization, “boilerplate” initially referred to steam engines of the Industrial Revolution and, by the end of the nineteenth century, to print casts of syndicated news carried from newspaper to newspaper.[42] By the early twentieth century, the circulated news items constituting the content of the casts were called “boilerplate,” which soon becomes a generalized term for standard expression, especially the formalized language of contract.[43] Invoking recontextualized writing, boilerplate’s etymological antecedents conjure up the disseminative process by which meaning is made.[44]

In contemporary parlance, “boilerplate” often evokes the meaning-obscuring potential of a reiterated or formalized expression. In particular legal contexts, however, standardized terms reflect a shared understanding in a network.[45] Standard terms operate as presumptively enforceable contract language, and they often, but do not necessarily, involve imbalances of power. The very uniformity that suggests attenuated significance in some contexts serves to clarify meaning in others. Even in the realm of contract, the meaning of the term “boilerplate” highlights the contextual contingency of terms generally.

The first Supreme Court invocation of the term “boilerplate,” Justice Hugo Black’s dissenting opinion in *National Equipment Rental, Ltd. v. Szukhent*,[46] illustrates the difficulty of characterizing standard-form contracts. Considering whether farmers who leased equipment in Michigan could be sued for payment in New York, the majority of the Court held that a contractually designated agent had established personal jurisdiction.[47] Dissenting, Justice Black argued that it “def[ies] common sense” to treat a situation in which "one party, at its leisure and drawing upon expert legal advice, drafts a form contract" as "an agreement coolly negotiated and hammered out by equals."[48]

Justice Black's dissent aims to distinguish a "standard printed form obviously prepared by the New York company's lawyers" from a notional paradigm of agreement.[49] p. 725 ↳ Doubting the likelihood "that these Michigan farmers … were in any position to dicker over what terms went into the contract they signed,"[50] Justice Black views the "printed form provision buried in a multitude of words" as "too weak an imitation of a genuine agreement."[51] Instead, a waiver of the right to be tried in one's home state "must be deliberately and understandingly made and can be established only by clear, unequivocal, and unambiguous language."[52] Justice Black asserts, "The idea that there was a knowing consent of [these individuals] to be sued in the courts of New York is no more than a fiction—not even an amiable one at that."[53]

While one might be sympathetic to Justice Black's characterization of a fiction of consent, deconstruction troubles an account of "clear, unequivocal, unambiguous language" of contractual waivers and the possibility of actualizing "genuine agreement." A speech act such as one manifesting "genuine agreement" necessarily embodies a so-called re-move,[54] or attenuation that enables it to be recontextualized, even standardized. More pointedly, Justice Black's own prescient warning complicates the distinction between attenuated consent and genuine agreement. As he predicts, clauses such as the one being enforced by the Court "will soon find their way into the 'boilerplate' of everything."[55] "Boilerplate" thereby disrupts the categories the opinion invokes, figuring as both the medium of contract and a parasitic imitation of agreement. Destabilizing the idealized model of contract, the opinion acknowledges the existing prevalence of regularized language—"the 'boilerplate' of everything"—as well as the potential for form language to proliferate, echoing prior articulations in new contexts. Indeed, the ubiquity of terms in the current electronic age instantiates this prediction.[56]

A broad view of the operation of standardized terms further complicates the dominant contract narrative of tailored terms reflecting intention. Viewed collectively, language identified as boilerplate demonstrates a range of expressive possibility.[57] Among other things, boilerplate has been characterized as standardized and customizable[58]; clear and obscure, depending on the reader[59]; opaque to all, but valuable as familiar[60]; p. 726 ↳ context-specific[61]; and context-independent by virtue of being portable.[62] So-called standard terms at times signal and perform meaning beyond or in contrast with the words' "plain meaning,"[63] screening meaning, manifesting fairness, or instantiating a deal.[64]

The expressive range of "standard" terms further complicates the distinction between the purported norm of contract as tailored expression and "boilerplate." Moreover, it highlights the dynamic relation of context and text in the process of meaning-making that deconstruction contemplates.

40.1.4 The Landscape Standard Form Refracts

Justice Black resisted characterizing standard form as contract, framing the farmers as the vulnerable parties.[65] Courts often point to terms they consider the product of negotiation as privileged evidence of intent, yet the determination of what constitutes "negotiated language" itself implicates contextual framing. Thus, for example, following the 2008 market collapse, a bankruptcy court weighed competing characterizations of contract terms in prioritizing rights of creditors. Examining a common provision preserving "all rights … given to the Bank by virtue of any … law," the court considered whether this served as negotiated language that thereby conveyed a special understanding between the parties or, instead, functioned as a generic "catchall."[66] To support the view of the provision as negotiated and thus indicating a specialized meaning, the creditor bank brought evidence that the term had been included, later removed, and ultimately reinserted in the document over the course of exchanged drafts between the parties.[67] Denying the creditor a claim on funds ahead of others, however, the court noted that this term was part of this bank's—and likely other banks'—standard forms. The court characterized the term as "boilerplate," which did not express intent to establish particular additional rights.[68] The court's designation of the provision as standard points to a broader context that includes other creditors for whom the term, ↳ p. 727 repeated in similar transactions, provided no signal of deviating from an accepted meaning in this network.

Though contracts are considered "private" law, understood to affect the parties to the deal,[69] the bankruptcy court's rejection of evidence of negotiation denotes the relevance, here, of a broader playing field involving other parties. In other circumstances, the law may elide a broader context to presume a landscape of voluntary choice. As a result, in some cases contract serves to reinforce existing inequities. Most notably, perhaps, current routine enforcement of ancillary terms in the consumer context, despite an awareness that individuals are unlikely to read or comprehend them, illustrates this phenomenon.

Behavioral research suggests that ancillary terms, governing issues beyond price and product, prove hard for individuals to assess. The "boundedly rational" nature of human cognition and the transactional and textual contexts of the terms undermine human beings' ability to meaningfully weigh these terms.[70] In transactions involving an imbalance of power and knowledge, such ancillary terms are not salient to individuals.[71] As a result, ancillary terms regularly go unread and unchecked in the American consumer market.[72] Because these terms may affect fundamental rights of the parties, scholars and judges have expressed concern about the contemporary application of contract doctrine.[73]

A recent case involving a putative class action against Uber alleging illegal price fixing illustrates the problem.[74] As a preliminary matter, the court had to consider the enforceability of a mandatory arbitration provision embedded in the terms of a smartphone app. If deemed enforceable, the provision could preclude individuals from pursuing collective action, attaining basic remedies in a court of law, or obtaining appellate review, thereby functionally undermining the possibilities for redress by the non-drafting party. As one federal judge noted,

> Since the late eighteenth century, the Constitution of the United States and the constitutions or laws of the several states have guaranteed U.S. citizens the right to a jury trial. This most precious and fundamental right can be waived only if the waiver is knowing and voluntary, with the courts indulg[ing] every reasonable presumption against waiver. But in the world of the Internet, ordinary consumers are deemed ↳ p. 728 to have regularly waived this right, and, indeed, to have given up their access to the courts altogether, because they supposedly agreed to lengthy "terms and conditions" that they had no realistic power to negotiate or contest and often were not even aware of.
>
> … in this brave new world, consumers are routinely forced to waive their constitutional right to a jury and their very access to courts, and to submit instead to arbitration, on the theory that they

> have voluntarily agreed to do so in response to endless, turgid, often impenetrable sets of terms and conditions, to which, by pressing a button, they have indicated their agreement.[75]

Notwithstanding these realities, recognized by many, courts typically bind parties to terms that they had the formal opportunity to read, even if they did not do so in practice.[76] Recent case law has affirmed and expanded the presumptive enforceability of ancillary contract terms, such as arbitration, forum-selection, or unilateral-modification provisions.[77] Formalities of notice and assent to the fine print have increasingly become the doctrinal norm in consumer contracting. The stark implications, in some circumstances, of positing agency, including circumvented fundamental rights, make salient the limits of the formalities of contract in the consumer context.[78]

Whether recognized as special or not, boilerplate implicates the purported contractual landscape, enabling the leveraging of existing power. A brief examination of the emergence of contract as a prevailing framework in a seminal moment of American history exposes how it functions as marker and tool of liberty. Viewed in light of the mutually constitutive dynamic of sign and context, the emergence of contract as a vehicle of freedom also illuminates the implicit values and structures of power that become naturalized in the process.

40.2 Contract as Manifestation of Freedom

A persisting conception of contract as a vehicle of autonomy can be traced to the seminal period of narratives of freedom in American history. Figuring the market as the "central institution" in facilitating the autonomy of private decision-makers, nineteenth-century judges expanded the law of contracts as the "legal framework for market dealing."[79] ↳ A counterpoint to slavery, contract also emerged as a defining American cultural construct during the era of Emancipation.[80] Growing out of the Enlightenment view of contract creating obligation through the exercise of free will, the formalized transaction of voluntary exchange shaped understandings of social relations and individual liberty.[81] Functioning as a sign of emancipation, contract defined the context in which an individual was deemed to be free.[82]

Freedom and choice thereby figured in the context of the market, itself a construct that suppresses disparities in resources and opportunity. As a result, contractual relations at times served to efface or perpetuate inequality. For example, vagrancy laws compelling poor individuals to contract their labor in return for aid were framed as granting beggars an opportunity to enter into an exchange relation.[83] More directly, formerly enslaved people, wielding relatively little power in the market, were offered contracts or new terms by Southern planters aiming to reproduce the controls of slavery.[84] As the ability to enter a contract concerning wage labor represented freedom from slavery, contract as a sign of free will harbored the potential to suppress a collective awareness of constraint and/or to reinforce inequities.[85]

The operation of contract in the nineteenth century demonstrates the dynamic relation of form and context, as individuals also found ways to mobilize contract to pursue liberty. Wielding the language of contractual rights, formerly enslaved individuals sued their employers, if not always successfully, for violations of contract in Freedmen's Bureau courts.[86] By invoking contract terms, including rights to wages and proper treatment, some individuals succeeded in resisting the disproportionate power their former masters wielded over them.[87]

In later iterations of the American pursuit of liberty, slavery recedes as the defining counterpoint to the substance of transactional freedom. Yet, existing structures of power—related to race, gender, and economic means—continue to constitute the context that informs contract. This framework shapes not only the possibilities of employment but also the development of the American landscape and the freedom of those in it. The opportunities for individual growth promised in form contracts of mortgages, for example, were curtailed by racist policies restricting loan grants and delineating neighborhoods through clauses prohibiting sale to non-whites in the mid-twentieth century.[88] The late-twentieth-century neo-liberal celebration of the market further obscured the operation of objective forms of contract to constrain individuals. In the twenty-first century, the pervasiveness of so-called boilerplate terms brings to light the p. 730 ↳ breadth of possibilities of signification of form language. Boilerplate both operates as a vehicle that naturalizes power and at times can be mobilized to resist it in original ways. As explored in connection with American literature in Section 40.3, the form language of contract implicates possibilities of original expression in the particularly circumscribed American context.

40.3 Literature as Context: The Particular American Framework of the Operation of Standard Terms

Literature illustrates the operation of standard form in different historical moments in the United States to reveal the substantive issues and values at stake. This section briefly examines some works that mobilize form language and suggest the possibilities for individual liberty through contract, from the nineteenth-century age of contract to what might be called the current boilerplate age.

40.3.1 The Nineteenth-Century Paradigm: Contract as Freedom of Wage Labor

Herman Melville’s mid-nineteenth-century tale “Bartleby, the Scrivener”[89] offers a portrait of individuality through the mobilization of language derived from standard contract terms.[90] Described as one of a “singular set of men,”[91] the eponymous scrivener complicates the distinction between idiosyncratic expression and standard form. Subverting the language and framework of the debt structure of “preference,” “assumption,” and “credit,”[92] Bartleby calls attention to the contextual frame, which presupposes freedom through wage labor and market terms. Thus, the story presciently evokes the limits of contract and Emancipation to come.

p. 731 Hired as a “law copyist” for a Wall Street practitioner with a “snug business among rich men’s bonds and mortgages and title-deeds,”[93] Bartleby plays an essential role in the production of form contracts: he reproduces indentures and similar standard legal instruments. Initially, prized by his employer as a “valuable acquisition,”[94] Bartleby reproduces contract form “silently, palely, mechanically,”[95] embodying the challenges to individual agency emerging from the industrial age.

Associating the singularity of the scrivener with his production of the always-already-copy, the narrative hints at the universal challenges of uncovering individual intent. Bartleby establishes his distinctive identity in his “unprecedented” refusal to engage in the work of producing boilerplate and ultimately to quit the space of his once-employment.[96] Through repeated variations on the refrain “I would prefer not to” he responds to his employer’s requests, among other things, that he perform tasks related to copying and that he provide information about himself.[97] Bartleby’s reiterated contingent assertion of preference not, in contrast to the other copyists’ language of “submission,” calls attention to the particular context established by the dominant order.[98]

Through repetition, Bartleby’s singular response not only becomes a familiar form in the office discourse but for a time alters the terms of his employment. Relatively early on, the narrator acknowledges

> that it soon became a fixed fact of my chambers, that a pale young scrivener, by the name of Bartleby … copied for me at the usual rate of four cents a folio (one hundred words); but he was permanently exempt from examining the work done by him … moreover, said Bartleby was never, on any account, to be dispatched on the most trivial errand of any sort; and that even if entreated

> to take upon him such a matter, it was generally understood that he would "prefer not to"—in other words, that he would refuse point blank.[99]

This description takes the form of a contract, specifying its subject and terms, and clarifying language where the drafter anticipates ambiguity. In restating the significance of the "general[] underst[anding]" of Bartleby's signature refrain, the narrative indicates how the phrase comes to have meaning and an effect on office procedure.

Not only does Bartleby's language impact the narrator's chambers, on closer examination, the language of preference is not necessarily original. "To prefer" is to designate one debt for repayment ahead of another.[100] Bartleby's distinctive language thereby borrows from the network of transaction that he seems to be trying to avoid.[101] Adapted from the very boilerplate language of a contract or judgment being copied, p. 732 Bartleby's ↳ signature term frames contractual relations as it communicates intent only obliquely.[102] In this way, Bartleby succeeds, at least for a time, in using contract form to negotiate and resist the structure of contract.

Ultimately, the tale reveals how the inherent limits of the ideal of contract represented by the narrator's world view restrict the possibility that Bartleby introduces. Bartleby becomes refigured in terms of familiar models of deviation. Though indebted to no one, Bartleby dies in a debtors' prison, treated like a vagrant or a forger.[103] In addition, as Bartleby's language circulates back into the dominant discourse, the expression of preference, when spoken by others, follows the accepted norm: Characters other than Bartleby "prefer" rather than "prefer not."[104] Bartleby's language continues to resonate but, as with contract generally, it is informed by the structure of power that does not necessarily recognize disparities of opportunity. At the same time, the narrative acknowledges the potential of expression, including democratic elections and mob law, to recalibrate the social dynamic.[105]

Anticipating the emergence of contract as a sign and vehicle of freedom in the decades that follow, "Bartleby" highlights the contextual contingency of form language. Through reiterated terms, the tale demonstrates the possibilities of signification and even idiosyncratic expression. In doing so, it identifies the defining context—and the limits—of wage labor and debt contract as the framework of freedom in this moment.

40.3.2 Twentieth-Century Form Language Shapes the American Landscape

In the mid-twentieth century, contemporaneous with Justice Black grappling with boilerplate, Thomas Pynchon's novel *The Crying of Lot 49* (1966) exposes the continuum between "genuine agreement" and a "standard … form."[106] Imagining a network of inscrutable signs that nonetheless have the potential to connect individuals, *Lot 49* reflects the temporal and geographic advance of the American capitalist project from nineteenth-century Wall Street to twentieth-century California. The novel situates the contractual ideal of agreement in a postmodern framework, exploring how constraints on agency shape the American landscape and the attainment of the American dream.

p. 733 The plot of *Lot 49* concerns the execution of a will and protagonist Oedipa Maas's suspicion of a "duty … to bring the estate into pulsing stelliferous Meaning."[107] Without first agreeing to, or even understanding, the mandate imposed upon her, Oedipa finds herself "named" executor of the estate of her former lover, Pierce Inverarity, a "real estate mogul."[108] Leaving her hermetic suburban world for San Narciso, the original site of Inverarity's land speculation, she becomes aware of the range of the American experience of capitalist opportunity. As Oedipa discovers an underground alternative mail system, identified as "WASTE," the novel explores the limits of communicated will and the possibilities of inscrutable form in the context of the American capitalist ideal. The novel thereby exposes the implications of form contracts for participation in American prosperity and freedom.

Evoking standard-form contract in its depiction of the landscape, the novel demonstrates how contract impacts individuals' place in society. It thereby situates American interpersonal relations in pervasive commercial and financial frameworks. Looking out on San Narciso, Oedipa perceives "less an identifiable city than a grouping of concepts—census tracts, special purpose bond-issue districts, shopping nuclei, all overlaid with access roads to its own freeway."[109] "Like many named places in California," San Narciso demonstrates the power of capitalism and contractual form to mold the environment.[110] The form language of bond issues becomes transformed—albeit through a "special purpose"—into the materiality of the city. Rather than generate a sense of human presence or experience, the landscape manifests capitalism.[111]

Described in legal and financial terms, San Narciso evokes the American history of expansion West and policies of exploitation and expropriation, undergirded by presumptions of Anglo-Saxon entitlement.[112] In the novel's account, "it had been Pierce's domicile, and headquarters: the place he'd begun his land speculating in ten years ago, and so put down the plinth course of capital on which everything afterward had been built, however rickety or grotesque toward the sky."[113] The "freeway" and its "access roads," built upon a network of commerce, also point to the American possibilities of liberty and social participation that figure in relation to the market. The "exhausted busful of Negroes going on to graveyard shifts all over the city" that Oedipa encounters in the San Francisco night exemplify the limitations and inequities naturalized in this ↳ American framework.[114] As the novel suggests, the landscape reflects restrictive clauses and redlining in the law—the legal backdrop that made home ownership significantly less accessible to people of color.[115]

Thus the novel comments on the role of contract as a qualified but embedded vehicle of agency that continues to facilitate the American capitalist project in the twentieth century. It explores the particular dynamic of American connection and access to freedom. This dynamic occurs in the context of a complacent and prosperous America that relegates a disinherited population to the margins, not least through structures of form contracting.[116] At the same time, the WASTE system offers a possible if incomplete rebuttal to a master narrative of American expansion and colonialism.

The cryptic symbol of the alternative system of communication, the silenced post-horn, figures the possibilities of connection that form language enables, if through citation and lacunae. As an undecoded sign drawn in the text, the silenced horn functions as a mark of attenuated connection. Emerging from her night in San Francisco, Oedipa is drawn to an old sailor by the post horn "tattooed in old ink now beginning to blur and spread" on the back of his hand.[117] Elision manifests the connection between them, highlighted by the presence of the symbol of the muted horn:

> "Can I help?" She was shaking, tired.
>
> "My wife's in Fresno," he said … "I left her. So long ago, I don't remember. Now this is for her." He gave Oedipa a letter that looked like he'd been carrying it around for years. "Drop it in the," and he held up the tattoo and stared into her eyes, "you know. I can't go out there. It's too far now, I had a bad night."
>
> "I know," she said. "But I'm new in town. I don't know where it is."[118]

The system on the margins offers a shared reference point, though the connection remains pervaded by ellipses and unfinished sentences. Even as Oedipa insists that she "can't help," "hardly knowing what she was doing, … she … took the man in her arms, [and] actually held him."[119] Thus the novel demonstrates the possibility of authentic connection enabled through inscrutable reiterated form. Through the selective accessibility of form contracts such as mortgages and deeds, it exposes the broader landscape and the individuals relegated to its margins. *Lot 49* thereby illustrates the process by which form language gives substance to American opportunity in the twentieth century and beyond, while suggesting how reiterated form might be reimagined on the margins.

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40.4 The Current Boilerplate Age

In the twenty-first century, form language proliferates, shaping nearly every aspect of contemporary life.[120] Although standard-form consumer contracts put particular pressure on the paradigm of contract as involving agency and autonomy, in other transactional dynamics form contracts enable generative collaboration and communication.

David Foster Wallace's unfinished novel *The Pale King* (2011) engages the way standard terms implicate resource allocation.[121] Imagining the bureaucratic shadow world of the Internal Revenue Service (IRS) as the site of conflict between social justice and the market, *The Pale King* explores how the social compact, manifested in the fine print of the tax code, has been upstaged and undermined by the desire to consume in the current era. In addition, Wallace's alter-ego narrator invokes the contract between author and reader in a manner evocative of an aspirational meeting of minds. The novel thereby deconstructs the paradigm of agreement while highlighting the crucial role played by boilerplate disclaimers in enabling human connection and idiosyncratic expression.

Embedded in Wallace's sprawling narrative as "§ 9." an "Author's Foreword" charges the reader to "[f]irst, please flip back and look at the book's legal disclaimer … that starts 'The characters and events in this book are fictitious.' "[122] The narrator acknowledges that "ordinary citizens almost never read disclaimers like this, the same way we don't bother to look at … any of the dull pro forma boilerplate on sales contracts and ads that everyone knows is there just for legal reasons."[123] Thus, a shared understanding ("everyone knows"), or, at the very least, specialized meaning keyed into structures of power, subsumes a potential cypher. At the same time, it points to the potential of standard terms to enable the narrator's purported "truth" and idiosyncratic expression. To tell his story, the narrator "need[s] you to … understand" the reach of the standard-form disclaimer [that the characters and events in the book are fictitious] to attain the "legal protection in order to inform you [the reader] that what follows … is, in reality, not fiction at all, but substantially true and accurate."[124] Mobilizing the language of standard disclaimers and limitations of liability, the narrative thereby highlights how these terms constitute the form as well as the substance of Wallace's story. The lacuna that boilerplate manifests—in the disparity in knowledge between transacting parties or as the limit point between conventional and idiosyncratic expression—comes to be embedded within the "truth."

p. 736 Not only does standard-form language enable an artist's revelation of his truth, but, as a deconstructive analysis suggests, it can reshape the contextual framework. As scholars note, at times the "contract process is designed to create context rather than respond to it."[125] Depicting a displacement of the values of "social justice and civic virtue" by an IRS prizing "the market model," *The Pale King* reminds us of how the fine print effecting neo-liberal reform serves to distribute resources in society.

Of late, certain form contracts have been mobilized with an eye to challenging the very structures of resource allocation that contracts and the current American social compact enable. Through innovative uses of standard form contracts, some have pursued more equitable access to opportunity. Thus, for example, a non-profit organization partnering with credit agencies has facilitated access for low-income, undocumented, or unbanked individuals to financial opportunity through the use of a standard promissory note. By recognizing previously informal "lending circles," this credit arrangement enables financially marginalized individuals to document and build credit.[126] Formalizing existing borrowing activities through contract allows once-excluded borrowers to gain access to the possibilities of growth in the American market. Innovations such as this demonstrate the importance of scrutinizing the context of contractual presumptions as well as the potential for standard-form contract to reconfigure the landscape of resource allocation. Standard forms, as the epitome of contracts generally, thereby reveal how existing structures of support and resource allocation play a central role in giving shape and substance to the way freedom is experienced and imagined in the United States.

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2 Alan Schwartz and Robert E. Scott, "Contract Theory and the Limits of Contract Law," *Yale Law Journal* 113 (2003): 541–625, 618.

3 See Tal Kastner, "The Persisting Ideal of Agreement in an Age of Boilerplate," *Law & Social Inquiry* 35 (2010): 793–823, for a discussion of how the idea of a meeting of minds informs contemporary scholarship engaged with standardized terms. This chapter draws in part on that essay.

4 Yannis Bakos, Florencia Marotta-Wurgler, and David R. Trossen, “Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts,” *Journal of Legal Studies* 43 (2014): 1–35, 3.

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8 Omri Ben-Shahar, “Preface: Or, A Boilerplate Introduction,” in *Boilerplate: The Foundation of Market Contracts*, ed. Omri Ben-Shahar (Cambridge: Cambridge University Press, 2007), xiv.

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10 See, e.g., Dalton, “Essay in Deconstruction of Contract Doctrine,” 1000.

11 Rather than a “determining center,” context, in deconstructive thinking, must be understood as contingent and constituted by the expression in question. Jacques Derrida, *Limited Inc* (Evanston, IL: Northwestern University Press, 1988), 18.

12 Wallace Stevens, “Anecdote of the Jar,” in *Harmonium* (Mineola, NY: Dover Publications, 2019).

13 ConocoPhillips Alaska, Inc. v. Williams Alaska Petroleum, Inc., 322 P.3d 114, 129 (Alaska 2014); Bowen v. Young, 507 S.W.2d 600, 605 (Tex. Civ. App. 1974).

14 Graham v. Scissor-Tail, 623 P.2d 165, 172–173 (Cal. 1981).

15 Thus, for example, courts have identified the presence of certain commonplace contractual provisions as possible “evidence [of] an intent to be bound by the agreement.” Longview Aluminum, L.L.C. v. United Steel Workers, 213 F. Supp. 2d 876, 880 (N.D. Ill. 2002).

16 Charles J. Goetz and Robert E. Scott, “The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms,” *California Law Review* 73, no. 2 (1985): 263–322.

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22 J. Hillis Miller, *Speech Acts in Literature* (Stanford, CA: Stanford University Press, 2001), 78.

23 Derrida, *Limited Inc*, 12.

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25 See Oliver Wendell Holmes, Jr., “The Path of the Law,” *Harvard Law Review* 10 (1897): 457–478, 463–464.

26 Schwartz and Scott, “Limits of Contract Law,” 594–595.

27 Patrick Bolton and Antoine Faure-Grimaud, “Satisficing Contracts,” *Review of Economic Studies* 77 (2010): 937–971.

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34 Derrida, *Limited Inc*, 18.

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36 Claire A. Hill, “Bargaining in the Shadow of the Lawsuit: A Social Norms Theory of Incomplete Contracts,” *Delaware Journal of Corporate Law* 34 (2009): 191–220, 215.

37 Tess Wilkinson-Ryan, “The Perverse Consequences of Disclosing Standard Terms,” *Cornell Law Review* 103 (2017): 117–175, 139, 148–165.

38 Derrida, *Limited Inc*, 9–10, 12, 48; Miller, *Speech Acts*, 75.

39 Jacques Derrida, *Of Grammatology*, trans. Gayatri Chakravorty Spivak (Baltimore, MD: Johns Hopkins University Press, 1976), 91.

40 Derrida, *Limited Inc*, 21.

41 Ibid., 13.

42 Carol Bast, "A Short History of Boilerplate," *Scribes Journal of Legal Writing* 5 (1994–1995): 155–156; Tina L. Stark, ed. *Negotiating and Drafting Contract Boilerplate* (New York: ALM, 2003), 9.

43 Bast, "Short History," 155.

44 See Miller, *Speech Acts*, 67–68, 83.

45 See Sharon Steel Corp. v. Chase Manhattan Bank, NA, 691 F.2d 1039, 1048 (2d Cir. 1982) (categorizing "boilerplate provisions" in indentures as independent of "the relationship of particular borrowers and lenders" and asserting they "do not depend upon particularized intentions of the parties to an indenture").

46 National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964).

47 *Id.* at 312–314.

48 *Id.* at 326.

49 *Id.* at 319.

50 *Id.*

51 *Id.* at 332.

52 *Id.*

53 *Id.* at 333.

54 Derrida, *Limited Inc,* 56.

55 *National Equipment Rental*, 375 U.S. at 328.

56 *Boilerplate: The Foundation of Market Contracts*, ed. Omri Ben-Shahar (Cambridge: Cambridge University Press, 2007); Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton, NJ: Princeton University Press, 2012).

57 I discuss the range of significations of boilerplate in Kastner, "Persisting Ideal of Agreement," 804–806, and draw on this discussion here.

58 See Margaret Jane Radin, "Boilerplate Today: The Rise of Modularity and the Waning of Consent," in *Boilerplate: The Foundation of Market Contracts*, ed. Omri Ben-Shahar (Cambridge: Cambridge University Press, 2007), 189–199, 190.

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64 Gilo and Porat, "Unconventional Uses of Transaction Costs," 983–1030.

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66 *In re* Lehman Bros. Holdings Inc., 439 B.R. 811, 818 (S.D.N.Y. 2010).

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69 *Id.* at 555.

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71 Korobkin, "Bounded Rationality, Standard Form Contracts, and Unconscionability," 1225-1252.

72 Bakos et al., "Does Anyone Read the Fine Print?," 19.

73 Radin, *Boilerplate*, 5–8, 33–34; AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1759 (2011) (Breyer, J., dissenting). For a discussion see also Tal Kastner, "'I'm Just Some Guy': Positing and Leveraging Legal Subjects in Consumer Contracts and

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74 Meyer v. Kalanick, 199 F. Supp. 3d 752, 755 (S.D.N.Y. 2016), *vacated sub nom.* Meyer v. Uber Techs., Inc., 868 F.3d 66 (2d Cir. 2017).

75 *Id.*

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77 See AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

78 See, e.g., Meyer v. Kalanick, 199 F. Supp. 3d 752, 755 (S.D.N.Y. 2016); Selden v. Airbnb, Inc., No. 16-CV-00933 (CRC), 2016 WL 6476934, at *1-*2 (D.D.C. Nov. 1, 2016).

79 James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison: University of Wisconsin Press 1956), 7–10.

80 See Amy Dru Stanley, *From Bondage to Contract* (Cambridge: Cambridge University Press, 1998), x.

81 Ibid.

82 Ibid., x, 1. The function of contract as a mark of individual will makes plain the operation of the sign in constituting its context. Derrida, *Limited Inc*, 18.

83 Stanley, *From Bondage to Contract*, 134–137.

84 Ibid., 42–43, 45.

85 Ibid., 59.

86 Ibid., 42–43.

87 Ibid., 42–44.

88 Alexis C. Madrigal, "The Racist Housing Policy That Made Your Neighborhood," *The Atlantic*, May 22, 2014, https://www.theatlantic.com/business/archive/2014/05/the-racist-housing-policy-that-made-your-neighborhood/371439/.

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91 Herman Melville, "Bartleby, The Scrivener," in *Melville's Short Novels*, ed. Dan McCall (New York: Norton, 2002): 3.

92 See example of nineteenth-century "Deed of Trust or Assignment for the Benefit of Creditors" and discussion of practice forms in Kastner, "Bartleby," 373–375.

93 Melville, "Bartleby," 10.

94 Ibid., 15.

95 Ibid., 10.

96 Ibid., 12.

97 Ibid., 10, 11, 12, 14, 15, 19, 20, 24, 30, 32.

98 Leo Marx, "Melville's Parable of the Walls," in *Bartleby the Inscrutable*, ed. M. Thomas Inge (Hamden, CT: Archon Books, 1979), 99.

99 Melville, "Bartleby," 15.

100 Ann Smock, "Quiet," *Qui Parle* 2 (1988): 68–100, 70.

101 See Naomi C. Reed, "The Specter of Wall Street: 'Bartleby, the Scrivener' and the Language of Commodities," *American Literature* 76 (2004): 247–273, 258.

102 Playing with contract language, Bartleby "prefer[s] not to" in contrast to the pro rata or "no preference" structure contemplated in a model nineteenth-century "Deed of Trust or Assignment for the Benefit of Creditors." *The Form Book: Containing Nearly Three Hundred of the Most Approved Precedents for Conveyancing, Arbitration, Bills of Exchange, Promissory Notes, Receipts for Money, Letters of Attorney, Bonds, Copartnerships, Leases, Petitions, and Wills by a Member of the Philadelphia Bar* (Philadelphia: Haswell, Barrington & Haswell, 1830), 224.

103 Melville, "Bartleby," 33.

104 Ibid., 13, 20–21, 27.

105 Ibid., 23, 29. When telling the story, the narrator no longer holds the position of Master of Chancery, which he enjoyed at the time of Bartleby's employment. Ibid., 5.

106 *National Equipment Rental*, 375 U.S. at 332, 319.

107 Thomas Pynchon, *The Crying of Lot 49* (New York: Harper Perennial, 1986), 64.

108 Ibid., 1. In a sort of reversal of the process Ellen Spolsky identifies, in which revengers, as disappointed seekers of justice,

try to restore balance outside the law, Oedipa comes to an awareness of systemic inequities by being made a part of a legal process. Ellen Spolsky, *The Contracts of Fiction* (Oxford: Oxford University Press, 2015), 181.

109 Pynchon, *Lot 49*, 13.

110 Ibid., 14.

111 Robert J. Hansen, “Law, History and the Subversion of Postwar America in Thomas Pynchon’s *The Crying of Lot 49*.” *Oklahoma City Law Review* 24 (1999): 589–608, 593.

112 The historical privileging of land speculation as a way to establish land ownership reflected who is recognized as part of American society. See Johnson v. M’Intosh, 21 U.S. 543 (1823); Paul Frymer, “Building an American Empire: Territorial Expansion in the Antebellum Era,” *UC Irvine Law Review* 1 (2011): 913–954.

113 Pynchon, *Lot 49*, 13.

114 Ibid., 98.

115 Madrigal, “Racist Housing Policy”; Ta-Nehisi Coates, “The Case for Reparations,” *The Atlantic*, June 2014.

116 William Gleason, “The Postmodern Labyrinths of Lot 49,” *Critique* 34 (1993): 83–99; Hansen, “Law, History,” 589–608.

117 Pynchon, *Lot 49*, 101.

118 Ibid., 102.

119 Ibid. Holding him, she seems to learn something about him: “She knew, because she had held him, that he suffered DT’s.” Ibid., 104. The implications of what she learns however remain elusive, again suggesting attenuated mutual understanding as the norm: “Behind the initials was a metaphor, a delirium tremens. … The act of metaphor … was a thrust at truth and a lie.” Ibid.

120 With respect to arbitration provisions in particular, see Jessica Silver-Greenberg and Robert Gebeloff, “Arbitration Everywhere, Stacking the Deck of Justice,” *New York Times*, Oct. 31, 2015.

121 David Foster Wallace, *The Pale King* (New York: Little, Brown, 2011).

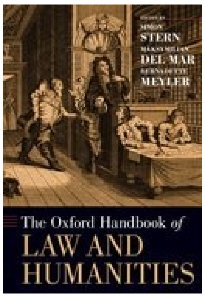
122 Ibid., 69. The placement of a purported “Foreword” (also citing the copyright page disclaimer) within the body of the novel highlights the incorporation of the margins, or in the case of boilerplate, the seeming exception to the rule, into the center. See Robert Spoo’s chapter, “Legal Paratexts,” in this volume.

123 Wallace, *Pale King, 69*.

124 Ibid.

125 Gilson et al., “Text and Context,” 44.

126 Patricia Cohen, “In Lending Circles, a Roundabout Way to a Higher Credit Score,” *New York Times*, Oct. 10, 2014; *MAF*, https://missionassetfund.org/.



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CHAPTER

41 Legal Paratexts

Robert Spoo

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Abstract

This chapter offers an overview of a genre that has attracted little attention qua genre: the legal paratext. Gérard Genette likened the paratext to a vestibule that operates as a zone of transition and transaction, a liminal space that prepares the reader’s experience of the text. Yet there are other, more cautionary paratexts that crowd, often invisibly, the vestibules of books and other cultural forms. This chapter surveys the transatlantic (American and British) repertoire of legal paratexts appearing in books, including copyright notices, once mandatory in the United States but now permissive there and in many countries; statements of US manufacture, deriving from a period in American publishing when copyright protection turned on strict compliance with the statutory requirement that books be physically manufactured on US soil; “all characters are fictitious” disclaimers, which urge readers to put aside their instinct to sue for libel or for privacy invasion and to engage with the text as a fictive and aesthetic creation; “no-obscenity” statements—a feature of many controversial modernist works—which seek to discourage official attempts at censorship and assure readers that books have been or are likely to be deemed by a court to be safe for consumption. Legal paratexts continue to crowd the vestibules of books, movies, musical recordings, and other works, warning readers, scolding them, and attempting to regulate their behavior in accordance with legal and corporate norms. They are linked to other literary genres, such as parody, satire, the apologia, and the palinode.

Keywords: paratexts, legal paratexts, copyright, manufacturing, libel, obscenity, parody, modernism, transatlantic

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A paratext, in the classic formulation by Gérard Genette, is a threshold (*seuil*) that both divides the world from the text proper and serves as a portal into the text, a way for the world to enter the author’s creation on terms of familiarity. Genette characterizes paratexts—book titles, prefaces, forewords, and the like—as “vestibules” that offer “the world at large the possibility of either stepping inside or turning back.” They operate as zones of “transition” and “transaction,” liminal spaces “at the service of a better reception for the text and a more pertinent reading of it.”[1] So conceived, the paratext promotes informed consumption, preparing the reader’s experience of the text or, sometimes, reshaping the reading experience once completed. In a way, paratexts sound in contract. They propose a transaction supported by consideration on both sides: a promise of textual pleasure in exchange for full readerly performance. As the text’s authorized agents, they escort the reader into the author’s habitation without force or fraud; they supervise her novitiate in the enjoyment of the text.

Yet even as they lead the world to the text, paratexts introduce the text to the world. Genette says that they “surround … and extend [the text], precisely in order to *present* it … to ensure the text’s presence in the world, its ‘reception’ and consumption in the form (nowadays, at least) of a book.”[2] In this role, paratexts are vehicles of socialization, mediating between the publisher and the reader, preparing the author’s creation for its début in a distracted world already crowded with competing stimuli. Paratexts make the text present and real in the world through what Kenneth Burke called the bureaucratization of the imaginative, the embodying of an imaginative possibility in “the realities of a social texture” and “the property relationships [and] methods of … production and distribution.”[3] Paratexts variously market the text, tout its singularity, explain its meanings, disguise its faults, and assist in the massification of the author’s brand.

p. 740 Introducing readers to the text and the text to the world are the chief but not the only functions of paratexts. As part of their public mediation, paratexts sometimes connect the author’s text with the world of the law. Unlike typical paratexts that seek to induct or educate readers at the text’s threshold, legal paratexts often discourage readers from engaging in certain activities with the text. They set strict conditions for the reader’s textual tenancy. For example, the copyright notice (©)—perhaps the most familiar of all legal paratexts—does not concern itself with the reader’s experience of the text but rather forbids the reader to consume the text in unauthorized and potentially unlawful ways. The copyright notice is a no-trespass sign and a limited license, in one. It fixes the metes and bounds of the author’s property claim and informs the reader, openly or by implication, that she may come on the property to enjoy it passively but may not be an active reproducer of the text or a producer of substantially similar derivative texts. She may read at will, but she may not copy, adapt, publicly perform, display, or distribute.

The legal dimension of paratexts has been discussed only rarely, mostly in the context of digital and videogame culture.[4] Genette himself pays scant attention to the legal paratexts that crowd the vestibules of books: copyright notices, statements about printing and manufacture, reminders that “all characters are fictitious,” and the like. This chapter offers an overview of the legal paratext as a bibliographic and literary genre that has attracted little attention as a genre. I will chiefly discuss the transatlantic (American and British) repertoire of legal paratexts and describe their different roles and functions. Like Genette, I offer here a mostly synchronic rather than deeply diachronic account. While I give some sense of the historical growth of each paratextual form, my main purpose is to “define objects before [studying] their evolution.”[5] That legal paratexts may become texts in their own right follows from their growth as a relatively fixed genre and is evidenced in part by their tendency over time to become objects of parody, pastiche, and caricature.

41.1 Copyright Paratexts

The most common legal paratext is undoubtedly the copyright notice, usually found on the verso of the title page, at least in the United States and other Anglophone countries. Not all countries have mandated copyright notices at all times. Although Britain in the nineteenth century required works to be registered at Stationers' Hall before a copyright action could be brought, inclusion of copyright notices in books was not a p. 741 condition of copyright protection or enforcement.[6] Under the 1911 British Copyright Act, copyright ↳ vested automatically when a work was created; the notice played no part in the acquisition of rights. As of 1908, the Berne Convention for the Protection of Literary and Artistic Works prohibited the use of formalities, such as notice, registration, and renewal, as conditions of copyright protection for works from signatory countries.[7] The copyright notice grew in popularity later in the century when the Universal Copyright Convention, adopted in 1952, required simple notices, thus encouraging Britain, the United States, and other signatories to make use of that paratext as a way of ensuring access to international markets.[8]

Books by British and Irish authors from the early twentieth century contained a variety of copyright notices, or sometimes none at all. The 1926 Chatto and Windus edition of C. E. Montague's novel *Rough Justice* carried the notice "All Rights Reserved," an old formula that gained new currency with the Buenos Aires Convention (1910), which governed copyright relations between the United States and Latin American countries. W. B. Yeats's *Essays*, published in London in 1924, bore the simple notice "Copyright" on the verso of its title page, but the first edition of Yeats's *A Vision*, privately printed by T. Werner Laurie in 1925, included no copyright notice among its numerous threshold paratexts. The first Paris edition of James Joyce's *Ulysses* bore a notice that barked its no-trespass warning in two languages: "Tous droits de reproduction, de traduction et d'adaptation réservés pour tous les pays y compris la Russie. Copyright by James Joyce."[9] This busy paratext reflected the anxiety of Joyce and his publisher, Sylvia Beach, over international piracy.

In the United States, copyright notices had long been required as a condition of protection or enforcement. By 1870, a book's title page or the page following had to bear the unwieldy formula, "Entered according to act of Congress in the year ___, by A.B., in the office of the Librarian of Congress at Washington."[10] The 1909 Copyright Act permitted short forms—"Copyright," "Copr.," and in some cases "©," along with the owner's name and the publication year—and made inclusion of notices in all published copies a make-or-break condition of copyright protection. If a notice contained an erroneous name or date, or if it appeared on some part of the book other than the title page or its verso—say, on the back cover—a court might dismiss an infringement action or declare the work's copyright forfeited.[11] The harsh pedantry of courts made authors and publishers dread the least failure to observe the etiquette of this paratextual convention. Not until the Copyright Act of 1976 did legislators relax the notice requirement; and only in 1989, with America's accession to the Berne Convention, did Congress make notices permissive rather than mandatory, though inclusion of notices in copies still affords benefits.[12]

p. 742 The ubiquity of the copyright notice is strangely matched by its near invisibility. Earlier copyright law emphasized the role of the notice in establishing the year of publication—a critical legal fact in the United States when copyright terms ran from publication rather than from the creation of the work—and in preventing members of the public from becoming unwitting infringers.[13] But today the notice has become more abstract and negligible, vestigial rather than vivid, a negative injunction crying in the wilderness of the digital age, a wishful stop sign for halting certain kinds of trafficking with the text. As the notice itself has diminished in legal significance, the copyright page has compensated by filling its space with prolix recitations of forbidden acts. The page has grown a forest of bristling prohibitions, the less read, perhaps, for their shrill, intemperate menace:

> All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without … prior permission in writing … or as expressly permitted by law, by license, or under terms agreed with the appropriate reproduction rights organization. … You must not circulate this work in any other form and you must impose this same condition on any acquirer.[14]

This bullying does not describe the law. It virtually ignores fair use, fair dealing, and other user-oriented features of copyright. Filled with combative overclaiming, it is a publisher's fantasy of total textual control, purporting to regulate even the reader's relations with other users ("any acquirer") and populating the world with faceless inquisitors and unnamed authorizers ("the appropriate reproduction rights organization"). This is the copyright notice grown paranoid, gibbering in the face of digital defeat.

Sometimes, these discursive copyright warnings can be verbose and didactic, even threatening or wheedling. The page then becomes passive-aggressive, veering between command and supplication:

> The scanning, uploading and distribution of this book via the Internet or via any other means without the permission of the publisher is illegal and punishable by law. Please purchase only authorized electronic editions, and do not participate in or encourage electronic piracy of copyrighted materials. Your support of the author's rights is appreciated.[15]

That final note of thanking-you-in-advance shows the copyright bully feigning a conciliatory posture. In other cases, a more nuanced, less author-centric vision of copyright law appears on the reverse of title pages: "This book may not be reproduced, in whole or in part, including illustrations, in any form (beyond that copying permitted by Sections 107 and 108 of the U.S. Copyright Law and except by reviewers for the p. 743 public press), ↳ without written permission from the publishers."[16] The references to statutory fair use and library exemptions suggest a less proprietary notion of publishers' entitlements. The actual contours of copyright law temper the fever dream of total monopoly.

The addressees of the copyright paratext are not just the actual readers of the text, those who pass through the vestibule and enter the author's edifice; they also include what Genette calls "the public in general—that is, every Tom, Dick, and Harry."[17] Pirates are not necessarily readers; they may be compulsive copiers, reproductive crime rings, delinquent hackers, cost-cutting publishers on the make. The proprietary bluster of the copyright paratext has at least one practical legal purpose: to make it clear that unauthorized copiers of the text cannot claim to be innocent infringers but instead are willful ones, subject to the highest statutory penalties a US court can mete out.[18] "You are on notice," this panoptic paratext warns, "even if you haven't taken the time to read me." The ultimate addressee of the copyright notice may be the federal judiciary.

In recent decades, the copyright page has become a sort of legal junkyard or thrift shop, accumulating all manner of official and officious statements unrelated to copyright itself. It seems to aspire to the condition of endlessly rolling screen credits. The page has long been a place for information about the publisher, ISBNs, and Library of Congress cataloguing data. But latterly it has become a locus for legal compliance of all sorts: "The University of Minnesota is an equal-opportunity educator and employer."[19] It includes trademark reminders: "Oxford is a registered trademark of Oxford University Press."[20] It proclaims the use of quality paper—"Printed on acid-free paper"[21]—and attests to observance of library conservation standards: "This paper meets the requirements of ANSI/NISO Z39.48-1992 (Permanence of Paper)."[22] The copyright page has become a crowded play for bureaucratic voices.

The copyright notice is plainly an example of the illocutionary paratext in a peremptory mood; it borders on a performative speech act, constituting rather than simply describing the law.[23] But who speaks this paratext? Genette classifies the copyright page as part of the "publisher's paratext"[24]—the flyleaf, half title, frontispiece, and so on—but the decalogic tones of the copyright paratext often transcend the vocal range of any publisher or author. Certainly, the notice is ultimately the product of lawyers and their scriveners, and p. 744 in that respect is an allographic (non-authorial but authorized) paratext, ↳ according to Genette's taxonomy.[25] The copyright notice might be said to be the law speaking itself, or at least to be the kind of non-hearsay verbal act in which "the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights."[26] The paratextual thundering of the copyright page can even seem to assert divine right or origin, like Blake's Rintrah who "roars & shakes his fires in the burdend air."[27]

The formulaic fanaticism of copyright paratexts has given rise to parodies, pastiches, and other self-conscious variations—circumstantial evidence that these paratexts have achieved the status of a literary subgenre. In an introductory note to Stuart Mason's *Bibliography of Oscar Wilde*, Wilde's friend and literary executor Robert Ross playfully threatened "to injunct the result of [Mason's] toil on the ground that he or his publishers had committed some breach of the Copyright Laws," but declined to do so because "Mr. Mason has pedantically observed all the principles of the Berne and Berlin Conventions and those other conventions which have no other authority than courtesy."[28] Ross's sardonic faux-legalism reflected his bitter court experiences and his distrust of international copyright conventions that had been adopted for combatting cross-border piracies but, lacking the signature of the United States, often did little to inhibit transatlantic exploitation of writers. (I discuss the practice of "courtesy" in section 41.3.) Ross's satirical paratext-within-a-paratext shows that copyright warnings could be literary exercises no less than pragmatic prescriptions. Similarly, James McNeill Whistler opened his revenge volume, *The Gentle Art of Making Enemies* (1890), with several notices describing a plot to pirate his writings—a conscious manipulation of the copyright paratext.[29]

More recently, Christopher Hitchens prefaced his memoir, *Hitch*-22, with an esoteric paratext captioned "Caute" ("take care," a nod to Spinoza) that begins, "I can claim copyright only in myself."[30] This puckish notice—echoing Wilde's purported remark at US customs, "I have nothing to declare except my genius"[31]—follows a typical copyright page complete with hectoring warnings and an assurance that the book complies with "environmentally responsible … management of the world's forests."[32] Scholars have noticed the formal literariness of the copyright page. In his study of modernist copyright-consciousness, Paul Saint-Amour performs a thought experiment by imagining what the copyright page of Joyce's *Ulysses* would have looked like had the book first been published under an intellectual property regime similar to today's p. 745 rights-cluttered culture.[33] Saint-Amour's witty *reductio* shows that copyright paratexts have become ↳ literary texts in their own right and may be subjected to the fires of irony usually reserved for more complex verbal constructs.

Tension between a paratext and the text it inhabits may generate intended or unintended ironies. The copyright page of William Patry's *How to Fix Copyright*—a book that calls for "a top-to-bottom systemic overhaul" of present copyright laws—conspicuously lacks a copyright notice and thus stages a clever paratextual pantomime of the reform for which the rest of the volume advocates.[34] Juxtaposed incongruity also arises in David S. Roh's critical study, *Illegal Literature*, which celebrates unauthorized forms of copying as solvents of reigning legal and business models. In unintended contrast to this polemic, the copyright page flatly forbids the reproduction of any "part of this publication … in any form or by any means … without the prior written permission of the publisher."[35] Not only does this paratext proscribe the extralegal dialogism that Roh's text promotes; it seems to deny the very possibility of fair use and other law-permitted copying. The copyright paratext may thus stand as metonym or symptom of the institutions that the adjacent text seeks to dismantle.

41.2 Manufacturing Paratexts

Closely related to the copyright notice is the familiar declaration, also a fixture of the title page's verso, "Manufactured in the United States of America" or "Printed in the United States of America." These avowals do not attest to the national pride of bookmakers but rather derive from a period in American publishing when US copyright protection turned on strict compliance with the statutory requirement that books be physically manufactured on US soil. Beginning with the Chase International Copyright Act of 1891, authors, foreign and domestic, could obtain US copyright only by having their books manufactured from type set within the United States or from plates made from such type. The 1909 Act retained those requirements for many works, including foreign-origin books in English, and even increased the burden by requiring that printing and binding also be performed within the United States. The clear legislative purpose was to protect American book manufacturers from the competitive effects of foreign bookmaking and imported publications.[36]

Nowadays, enjoyment of US copyright protection no longer depends on American manufacture or other formalities. Until the 1950s, however, manufacturing and printing recitations were true legal paratexts, informing governmental authorities and potential pirates that the manufacturing requirements had been satisfied by tribute paid to American book artisans. Unlike copyright notices, these paratextual avowals did p. 746 not warn readers to avoid certain ways of consuming the text; they were not addressed to ↳ ordinary readers at all. Instead, they declared that a statutory condition of legal protection had been satisfied. They announced the lawfulness of the text itself.

Today, these phrases are vestigial—museum pieces reflexively hung in the vestibules of books. Yet they persist, sometimes in the face of full knowledge of their obsolescence. Merriam-Webster's *Manual for Writers and Editors* explains that " 'Made [*or* Printed] in the United States of America [Hong Kong, Italy, etc.]' is no longer legally required but is often included,"[37] while retaining on its own copyright page the very paratext it demystifies: "Printed and bound in the United States of America."[38] That copyright and manufacturing notices still preface many American books, despite their diminished role in today's law, testifies to their durability as inertial subgenres of the legal paratext.

41.3 Courtesy Paratexts

During the nineteenth century and part of the twentieth, US copyright law offered little or no protection for foreign works. Such a legal vacuum might seem a windfall to American publishers, but copyright-free foreign literature proved to be a mixed blessing. Though gifted a commons brimming with popular foreign fiction, publishers realized by the 1850s that they had to impose some kind of order on unrestrained reprinting if they hoped to control the price of books and sustain their lists of foreign titles. Free resources could be lucrative only if they were somehow allocated, not promiscuously fought over, so publishers adopted a form of self-regulation called the courtesy of the trade, or trade courtesy—an informal, norms-based practice that imitated the main features of copyright law and permitted both publishers and authors to benefit, though inconsistently, from the wholly extralegal rights that courtesy recognized.[39] Publishers collusively respected each other's claims to particular foreign authors or titles, and paid the authors or their original publishers sometimes handsome honoraria or royalties. Dickens received £1,000 each for the uncopyrighted *Our Mutual Friend* and *A Tale of Two Cities*. To be a courtesy publisher was to agree to participate in a communal fiction that the American publisher Henry Holt proudly referred to as a form of "philosophical anarchism—self-regulation without law."[40] Those who defied the fiction, who insisted on taking the public domain literally, were viewed as unregenerate pirates by the courtesy fraternity.[41]

By the 1850s, courtesy publishers often made a point of including special paratexts in their editions of foreign works. These items, typically appearing in the opening pages of books, extolled courtesy norms and often took the form of testimonials by foreign authors exclusively "authorizing" the editions and urging p. 747 other houses to respect the ↳ approved publishers' courtesy claims. By binding into their books prefatory matter of a legitimizing and normative nature, courtesy publishers signaled the probity of their business dealings to readers in the vestibule and to fellow publishers across town and in other cities. For example, Robert Browning's Boston publisher Ticknor and Fields prefaced reprints of his works with a letter in which the poet warmly acknowledged the "liberal" remuneration the firm had paid him for his unprotected works, and expressed his "earnest desire that the power of publishing in America this and every subsequent work of mine may rest exclusively with your house."[42] Thomas De Quincey, too, praised Ticknor for making him "a participator in the pecuniary profits of the American edition [of his works], without solicitation or the shadow of any expectation on my part, without any legal claim that I could plead, or equitable warrant in established usage, solely and merely upon your own spontaneous motion."[43] Ticknor printed this gratefully melancholy confession in many of its De Quincey volumes.[44] The courtesy paratext allowed copyright-deprived authors to make an intimate appeal to American readers and pirates.

Courtesy principles survived into the 1960s in American publishing, largely because US copyright law imperfectly protected foreign works well into the twentieth century. When in 1965 J. R. R. Tolkien's *Lord of the Rings* appeared in a pirated version, courtesy paratexts were essential to his recovery of the American market. The back cover of the authorized Ballantine edition of his trilogy carried his direct appeal to the common reader: "This paperback edition, and no other, has been published with my consent and co-operation. Those who approve of courtesy (at least) to living authors will purchase it, and no other." Tolkien aimed this paratextual plea at readers themselves, as if courtesy principles should be embraced by loyal consumers no less than by honest publishers. Tolkien's request helped raise his stories of Middle-earth to iconic status in the United States.[45] Courtesy paratexts played a role somewhat analogous to the no-trespass exhortation of the copyright notice, but they went beyond this purely prohibitory function—which in the case of courtesy had only extralegal force anyway—to remind the world that the cohesive community of respectable publishers could, by voluntary collective action, be better than their country's ungenerous law.

41.4 No-Libel Paratexts

Many contemporary books, movies, and television dramas are prefaced by something like the following: "All characters appearing herein are fictitious. Any resemblance to real persons, living or dead, is purely p. 748 coincidental." Whereas the barking dog of ↳ all-rights-reserved warns against trespasses on authorial property, this disabusing paratext discourages a faulty reading practice. It appeals to the reasonableness of readers in the vestibule, asking them to respect the difference between imagination and life and to avoid crude *roman à clef* assumptions. The no-libel paratext urges the deluded, the literal-minded, and the thin-skinned to put aside their instinct to sue for libel or for privacy invasion and to play the author's game of fictiveness in a sporting spirit. It places strict boundaries around the text's presence in the world and urges consumers to make proper use of the work, so that interpretative misprision does not convert a desired transaction into unwanted legal conflict. The no-libel paratext typically plays little role in enhancing the reader's textual pleasure or guiding her interpretative activity, except to channel that activity away from confrontations with the real world.

Yet certain complex examples merge aesthetic and legal instruction. In his preface to *The House of the Seven Gables*, Nathaniel Hawthorne wittily combined the no-libel paratext with a rumination on the genre of narrative romance, insisting that the "personages of the tale … are really of the author's own making, or, at all events, of his own mixing," and that it would be "an inflexible and exceedingly dangerous species of criticism [to bring the author's] fancy-pictures almost into positive contact with the realities of the moment."[46] In his preface to *The Blithedale Romance*, Hawthorne again asserted that his characters were "entirely fictitious" despite any resemblance between the utopian community depicted in the novel and the actual Brook Farm in Massachusetts.[47] His dual purpose was to discourage claims of libel and to assert the primacy of the non-realistic and the imaginary in his aesthetic craft, to make literary autonomy double as a shield against legal harassment.

The no-libel paratext is the rhetorical reverse of what might be called the no-lie paratext. Authors seeking to impress readers with the historical truth of their accounts have often guaranteed veracity, as when an anonymous allographic paratext in Frederick Douglass's *My Bondage and My Freedom* told readers that they were "not invited to a work of Art, but to a work of Facts," and assured them that "there is not a fictitious name nor place in the whole volume."[48] The no-lie paratext could also form part of the apparatus of fiction —particularly in periods when historical truth and mimetic simulation were not yet separate categories[49]— as when the "editor" of *Robinson Crusoe* (1719) affirms his belief that the account he purveys is a "just History of Fact; neither is there any Appearance of Fiction in it," and that the reader will receive "Diversion" and "Instruction" just as though she were enjoying an edifying romance.[50] (Another of Defoe's p. 749 prefaces contains an early copyright paratext, assailing unauthorized abridgments ↳ as no different from "Robbing on the Highway, or Breaking open a House.")[51] Edgar Allan Poe, who delighted in literary hoaxes, often urged the truth of wildly sensational accounts, as in his tale of mesmerism, "The Facts in the Case of M. Valdemar" (1845).

The no-libel paratext proliferated in the early decades of the twentieth century, when, as Sean Latham shows, libel lawsuits—feared, threatened, or filed—dogged the writings of D. H. Lawrence, Wyndham Lewis, George Orwell, and other writers.[52] Menaced with liability in a period that saw the spread of mass celebrity culture, modernist authors resorted to this defensive paratext as a charm against litigation. The Scribner editions of Ernest Hemingway's *In Our Time* and *To Have and Have Not* contained the irritable, lawyerly caveat: "In view of a recent tendency to identify characters in fiction with real people, it seems proper to state that there are no real people in this volume: both the characters and their names are fictitious."[53] A paratext in Radclyffe Hall's *The Well of Loneliness* assured the easily defamed: "All the characters in this book are purely imaginary, and if the author in any instance has used names that may suggest a reference to living persons, she has done so inadvertently." Hall's paratext went on to praise a British women's ambulance unit during World War I and distinguished it from the unit that includes her main character Stephen Gordon, which "never had any existence save in the author's imagination."[54]

The presence in the same volume of no-libel and no-lie paratexts can lead to planned or unplanned ironies. Dan Brown's tale of secret religious history, *The Da Vinci Code*, contains the familiar "this is a work of fiction" paratext on its copyright page, but it opens with a statement boldly captioned "FACT" that describes the secret Priory of Sion and the sect of Opus Dei, and insists that "[a]ll descriptions of artwork, architecture, documents, and secret rituals in this novel are accurate."[55] This blending of believe-me and believe-me-not gives Brown's fiction its atmosphere of sensational disclosure while leaving it to the reader to separate the real from the invented. Alice Randall's novel *The Wind Done Gone*—an inverted retelling of Margaret Mitchell's *Gone With the Wind* from the perspective of a freed slave—begins with "Notes on the Text" that assure the reader, in the manner of Defoe, that the story that follows is a "document … discovered in the early 1990s … among the effects of an elderly colored lady."[56] This no-lie guarantee is surrounded, however, with nervous disclaimers stating that the "novel is the author's critique of and reaction to … *Gone With the Wind*. It is not authorized by the Stephens Mitchell Trusts, and no sponsorship or endorsement … is implied."[57] The cover of *The Wind Done Gone* carries the paratext, "A provocative literary parody that explodes the mythology perpetrated by a Southern Classic," along with a large red sticker announcing, "An Unauthorized Parody." These no-infringement paratexts were part of Houghton Mifflin's p. 750 ultimately successful campaign to establish a fair-use parody defense in its ↳ copyright litigation with the Mitchell Trusts. Here, revisionary fiction, no-lie paratexts, and no-infringement paratexts converge to draw the reader directly into the pitched legal battle over *The Wind Done Gone*. Through paratextual insistence, the lawsuit enters the text itself; the literary becomes the legal.

The durability of the no-libel paratext, despite its limited prophylaxis against legal liability, suggests a certain magical thinking in the culture industries. The formula is not confined to books, of course. It has become a rote recitation of television dramas, especially productions like *Law and Order* that rip their plots from the day's headlines. "All characters are fictitious" disclaimers have been used by Hollywood filmmakers since at least 1934.[58] The undisguised purpose of these rigid formulas is to avoid or reduce the severity of legal combat, yet, as Latham notes, "their heightened visibility ironically reassur[es] the reader that there may indeed be some outrageously scandalous facts for a well-trained social detective to extract."[59] The no-libel disclaimer can arouse as well as allay suspicions, and its ubiquity makes us wonder if an innocent, non-referential fiction is really possible.

The boilerplate diffidence of this pervasive subgenre has inevitably spawned parodies and satires, especially by authors who have felt confined by the law's strict policing of fiction's boundaries. To his collection of roman à clef stories, *Triple Fugue*, Osbert Sitwell appended the cheeky paratext: "I should … wish to warn my readers that any character attempting to recognize himself will be immediately prosecuted for libel."[60] The brazen quibble on "character," as if fiction and reality were already merged in Sitwell's satirical sketches, is compounded by the notion that the author might have a cause of action against any person impudent enough to search for himself in the book.

Mark Twain opened *Huckleberry Finn* with a similar mock-menacing paratext, except that he turned the rhetoric of the no-libel formula into an attack on literary pretention: "Persons attempting to find a motive in this narrative will be prosecuted; persons attempting to find a moral in it will be banished; persons attempting to find a plot in it will be shot, by Order of the Author Per G.G., Chief of Ordnance."[61] The aggressive crescendo of these attempt crimes and their corresponding penalties is ironically balanced on the next page by a variant of the no-lie paratext in which Twain assures the reader that the dialects used in his narrative have been rendered "with the trustworthy guidance and support of personal familiarity with these several forms of speech."[62] In his preface to *A Connecticut Yankee in King Arthur's Court*, Twain plays with the idea of defaming history itself, claiming that he has cast "no libel" on sixth-century England by supposing, without firm evidence, that it shared "ungentle laws and customs" with later periods—and then proceeds to libel the period anyway by affirming that "whatever one of these laws or customs was lacking in that remote time, its place was competently filled p. 751 ↳ by a worse one."[63] Twain impishly combines a no-lie affirmation of historical accuracy with a no-libel assurance, followed in turn by a yes-libel insult. The parodic possibilities are endless for ridiculing the cautious, safety-first subgenre of the no-libel paratext.

41.5 No-Obscenity Paratexts

No-obscenity paratexts, though rare today, were common in the United States and Britain in the 1920s and 1930s when obscenity prosecutions grew to include serious works of literature and books about birth control, adult sexuality, marriage equality, and other controversial subjects. These paratexts—judicial decisions, lawyers' statements, publishers' notices, and other allographic interpolations—were aimed at prosecutors, social-purity groups, and the purchasing public. They were meant to discourage official and semi-official attempts at censorship and to assure nervous readers in the vestibule that the principal text had been or was likely to be deemed by a court to be safe for consumption. These certificates of lawfulness prepared readers for an experience of strong but lawful authorial candor and discouraged the view that the work had been written for the salaciously minded. They combined interpretative aesthetic guidance for serious readers with a negative injunction intended for those who might search the text for a lascivious experience. Like the no-libel paratext, the no-obscenity paratext was a sorting mechanism: it divided genuine readers from textual opportunists.

The attorney Morris L. Ernst popularized the practice of including judicial opinions or similar matter in controversial volumes as a way of retarding the aggressions of law enforcement and causing censorship groups to hesitate before commencing proceedings. When US customs officials were seizing imported copies of *The Decameron*—a text that had been judicially cleared of obscenity nearly forty years before—Ernst wrote a foreword for the Modern Library reprint in which he discussed earlier attempts to suppress Boccaccio's work and noted its modern acceptance as "legal literature."[64] Shortly after he had persuaded a federal court to allow Marie Stopes's *Married Love* to be imported into the United States, Ernst wrote a preface for her sequel, *Enduring Passion*, in which he pointed to the "liberalizing decisions of our courts" in recent decades and praised Stopes's contribution to "decent, intelligent and full sex education."[65]

The no-obscenity paratext sometimes operated both as a declaration of legal victory and as a homeopathic use of law to inoculate the text against further legal threats. When a New York appellate court declared *The Well of Loneliness* safe for public morals, the publisher Covici-Friede celebrated by issuing a "Victory Edition" containing an account of the court proceedings specially written by Ernst. As late as 1959, Grove Press made use of this strategy in its unexpurgated edition of D. H. Lawrence's *Lady Chatterley's Lover*, inserting an extract from a recent federal decision declaring the book not obscene and adding a letter from lawyer and former Librarian of Congress Archibald MacLeish giving his opinion that the uncut text was "not obscene at all in any meaningful sense."[66] With a lengthy literary appraisal by Mark Schorer, the edition contained both aesthetic and legal paratexts to aid the reader in the text's vestibule.

Ernst weaponized but did not invent the strategy of introducing protective or commemorative paratexts into purportedly indecent works. A classic example was the 1873 definitive edition of *Madame Bovary*, for which Flaubert agreed to append a transcript of the 1857 trial at which his attorney, Antoine Marie Jules Sénard, successfully defended him against charges of having damaged public morals.[67] Flaubert had dedicated the 1857 edition to Sénard for having conferred an unexpected authority ("*une autorité imprévue*") on the novel through his magnificent courtroom defense ("*votre magnifique plaidoirie*").[68] Flaubert's manipulation of legal paratexts across the two editions thus achieved a kind of chiastic irony: just as Sénard had made Flaubert's writing part of his legal work, so the text of the novel now came to embody Sénard's pleading within its pages.

George Bernard Shaw also shaped the institution of the no-obscenity paratext. To the first published text of *Mrs. Warren's Profession* (1902)—a play that had been banned from the English stage by the Lord Chamberlain—Shaw added a thirty-page "Author's Apology" that wittily denounced English hypocrisy, censorship, and false moral panics. His eighty-page preface to *The Shewing-Up of Blanco Posnet* (1911)—a drama refused public performance because of its references to God and religion—was a no-blasphemy paratext that deplored British censorship and the government's failure to reform it. No-obscenity paratexts could sometimes be subtle, never openly mentioning imputations of indecency but challenging them nonetheless. In addition to making prudent changes to the book version of *The Picture of Dorian Gray* (1891), Oscar Wilde responded to press accusations of immorality by prefacing the volume with aphorisms that extolled the artist as a creator of beautiful things transcending morality and immorality. Similarly, T. S. Eliot wrote a literary appreciation for the American edition of Djuna Barnes's *Nightwood* (1937), a novel he had published the year before with Faber and Faber in England after excising some of it references to homosexual sex. Eliot's aesthetic paratext, like Wilde's, may have been partly a self-imposed penance for the sin of textual mutilation.

Morris Ernst's monument to the paratextual tradition was the 1934 Random House edition of *Ulysses*, which contained three legal paratexts: Ernst's foreword celebrating the convergence of the repeal of Prohibition p. 753 and the lifting of the customs ban on ↳ *Ulysses*; Judge John M. Woolsey's urbane decree sparing Joyce's book from forfeiture and destruction; and a letter by Joyce to Random House's Bennett Cerf certifying that "not only will your edition be the only authentic one in the United States but also the only one there on which I will be receiving royalties."[69] Two genres of legal paratext were present here. The first two documents were no-obscenity paratexts, while Joyce's letter hearkened back to the nineteenth-century practice of including prefatory letters by foreign authors as a way of legitimizing editions that enjoyed little or no formal copyright protection in the United States.

Joyce's courtesy paratext acknowledged his inability "to acquire the copyright [of *Ulysses*] in the United States" and appealed for courtesy treatment by claiming "authentic" status for Cerf's edition.[70] While Judge Woolsey's decree opened the harbors to *Ulysses*, Joyce's letter sought to close the door to lawful pirates who now might go to work with their greatest legal fear much allayed: prosecution for publishing obscenity. Cerf reasonably worried that competitors would quickly and lawfully free-ride on his success in freeing *Ulysses* from the censor, leaving him with nothing but a moral victory.[71] Joyce's courtesy paratext quietly supplemented the Random House edition's copyright notice: "Copyright, 1918, 1919, 1920, by Margaret Caroline Anderson. Copyright, 1934, by the Modern Library, Inc."[72] This cobbled notice, citing magazine and book versions of *Ulysses*, confessed *sotto voce* to Joyce's legal disability in America.[73]

Like other legal paratexts, the no-obscenity subgenre has attracted parodists. That master of the mischievous paratext, Vladimir Nabokov, ghosted a foreword to the first and later editions of *Lolita* over the signature "John Ray Jr., Ph.D." Psychologist Ray's preambular plea is for recognition of Humbert Humbert's carceral confession as a cautionary tale of bungled childrearing, a sensationally obsessive mea culpa which Ray justifies in the clinical light of its "moral apotheosis." According to Ray, what might seem in *Lolita* to be self-serving eroticism is "strictly functional" in the service of a greater life lesson. Then, skipping to the other end of the justificatory spectrum, he urges the work's magically "singing violin," its transcendence of its own "expiatory aspects."[74] In the space of two paragraphs, Nabokov, his Ray mask slipping slightly, archly advances two well-worn arguments for the tolerance of literary indecency: moral comeuppance and aesthetic redemption.

John Ray's foreword is a reverent pastiche of the no-obscenity paratext. He pays homage to the subgenre's masterpiece by alluding to Judge Woolsey's "monumental decision" and its conclusion that *Ulysses* is nowhere an "aphrodisiac."[75] Noting that *Lolita* avoids the kind of banal lubricity that expresses itself in "four-letter words," Ray nevertheless concedes that a "certain type of mind" might charge the work, p. 754 superficially, ↳ with aphrodisiac tendencies.[76] When in 1995 Pia Pera published *Diario di Lo* (*Lo's Diary*)—a retelling of the events of *Lolita* in the voice of the nymphet herself—Pera invented a new preface by John Ray, a parodic meta-paratext to accompany her revisionary meta-text. After Nabokov's son sued for copyright infringement, the parties settled their dispute by agreeing that a percentage of royalties from sales of *Lo's Diary* would go to a writers' association, and that the volume would contain a foreword by Nabokov's son and an afterword by Pera (though Pera in the end did not contribute her paratext).[77] This plan for dueling briefs shows that legal paratexts can be a way of internalizing litigation within the contested text itself. Indeed, many legal paratexts might be viewed as a safe counterpart to potential or actual litigation, a sublimation of overt legal combat in a verbal performance of law's operations—a kind of metonymic appeal to a readerly high court.

41.6 Conclusion: Paratexts as Law and Literature

Legal paratexts fill the vestibules of today's cultural forms—books, motion pictures, musical recordings—as therapies for regulating the habits of consumers. Copyright notices, FBI warnings, and "all characters are fictitious" disclaimers crowd the portals of popular entertainment, though we are rarely or barely aware of them. They are largely invisible admonitions, easily skipped by the turning of a page or the pressing of fast-forward—thought of, if at all, as part of proprietary culture's standard throat-clearing. The history of legal paratexts is a history of feared or actual litigation, a gradual deposit of law's dreaded effects within the embattled texts of the past two or three centuries. They are accretions of the folk wisdom of the culture industries, the superstitions of the boardroom, and the belt-and-suspenders advice of publishers' lawyers. They are charms against law's nightmares.

Yet legal paratexts are more than law's auxiliaries; they also exist as literary forms in their own right. The no-libel and no-obscenity paratexts bear a family resemblance to the apologia—the formal speech in defense of a position or an action. The no-libel paratext might be viewed as an anticipatory palinode, retracting the text's disparagements before they have begun. The literariness of legal paratexts is also evidenced by their vulnerability to parody, pastiche, and satire. They attract formal ridicule because of their distinctive rhetorical postures and décors no less than their atmosphere of prudence and pusillanimity. They comfortably occupy the vestibules of texts because they too are texts, and, though seeming to be voiced by the law itself, they are not entirely alien to the author's vocalizations. They pass for texts in a world of textuality. They induct us into the contiguous worlds of law and literature.

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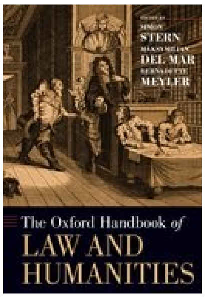

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CHAPTER

42 Emblems

Valérie Hayaert

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Abstract

The early modern tradition of the emblem book offers a fertile ground to uncover the renewal of legal ethics during the Renaissance. Andrea Alciato was first and foremost a lawyer, and juridical themes abound in his *Emblematum libellus*. Later emblematists forged visible figures of norm and law, which stage and enact the rites and harmony of a living legal visual tradition. Inserted into the body of law reference texts or used as ingenious mnemonic devices, emblems played a role in the *ars memorativa* deployed by legal educators. In the case of Johannes Buno, visual images were designed especially to help fix the order of titles in the *Digest* and their contents. Emblems and symbolic places would serve as topical frameworks, headings for the reference texts, and notable visual commonplaces to highlight important issues. The emblematic quality of memory images was valuable for the jurist, who could reconstruct an entire legal text, speech, or case. The importance of emblems in transmitting law and the imaginary representation of legality was key to building a professional ethos in the humanist *respublica jurisconsultorum*. Emblem books provided shared judicial values, norms of conduct, and signs of office. The early history of legal emblems requires being attentive to the profound multivalence of their form and structure: their prolixity of applications and the variegated ways in which images and texts illuminate each other and provide numerous examples of making, seeing, and saying judicial ethics.

Keywords: emblems, ars memorativa, legal visual mnemonics, legal visual argumentation, early modern jurists, legal symbolism, judges' ethics

Subject: Jurisprudence and Philosophy of Law, Law and Society, Law

Series: Oxford Handbooks

Collection: Oxford Handbooks Online

THOUSANDS of emblem books were produced and published during the early modern period; as such, they provide a useful heuristic tool for understanding early modern culture. This chapter aims at recovering their role in visual thinking: cognitively, emblems may serve as visual commentaries[1] on legal problems as well as tools for teaching or memorizing legal principles. Emblem studies have largely ignored the profound interest legal humanists devoted to diagrams and visual representations, because emblem books are very varied in nature and scope. A semantic study of *emblema* shows that the word itself has a wide array of meanings. Originating from a Greek verb meaning "to throw," "to insert," or "to put in," the Latin *emblema* refers to a detachable ornament, a graft, a mosaic, or other inlaid work.[2] The word came down to the Renaissance through two main streams of transmission, one legal and the other literary and rhetorical. Andrea Alciato was well aware of the multiple valences of this notion, and the basic meaning of the Greek word (a detachable piece) is to be related to a more general context where the progressive historical and philological method applied to the *Corpus Juris Civilis* revealed new ways of apprehending the humanist reception of Roman law and its frames of reference.

This chapter aims to define the emblematic by linking these two streams of transmission and showing that the epistemic cross-current dialogue between law and humanities can help to better define this phenomenon. In the legal tradition, the word dates back to the *Digest* and refers to detachable ornaments on silverware as described in the legal codes for the transfer of property by inheritance or sale. Likewise, it could refer to a container and its contents.

When these senses were recovered by legal humanists in the fifteenth century, they quoted Cicero's and
p. 758 Quintilian's uses of the term, where the word refers to detachable ↳ rhetorical ornaments and commonplaces used to adorn pleas or speeches. Young orators worked a set of tropes that served at sites of legal invention. In an ironic sense dating back to Quintilian and Cicero, the word can refer to the figures plundered from better authors by bad orators short of inspiration. But in both contexts (legal property of precious silverware or an author's property of his own speech), the emblematic links a detachable piece to a host composition. The most important summary of the legal use of the word appears in Guillaume Budé's *Annotations on the Pandects* of 1508, which the humanist lawyer Andrea Alciato from Milan (1492–1550), the first author of an emblem book, published in 1531, knew very well. The term "emblem" is elucidated in a concise and clear way in the *Treatise of Symbols* (1571) by French magistrate Claude Mignault (1536–1606),[3] probably the best commentator on Alciato's *Emblemata*, since he relentlessly used them as teaching tools in university programs. Mignault's treatise[4] is key for understanding how Alciato defined the nature and the function of emblems. The emblem is not as obscure as a riddle, it is "worthy of free men," because through the doctrine of its symbols "the mind is extended, judgement is increased, the memory is exercised, and a wonderful pleasure is found." Mignault warns that emblems should be kept away from the unskilled. The emblem differs from "an aphorism or maxim, although emblems often contain maxims within themselves … for the emblem is often 'silent'; it is not always necessary in the emblem that an epigram should be added. … So too, the emblem is not an adage or proverb, because the emblem is something clever, conceived by clever people, if I can put it like that, but the adage may be speech circulating in everyone's mouth."[5] For our concerns, it is important to note that Alciato's own definition of emblems occurs in his commentary on a title of the *Digest* (50, 16), "On the meaning of things and words." He says: "Words signify; things are signified. But things too can sometimes signify, such as the hieroglyphs in Horus and Chaeremon. In this genre I too have composed a little book in verse whose title is *Emblemata*."[6] The invention of this association between image and text is thus explicitly referred to a legal commentary about the visive power of words. At the end of his legal commentary, Alciato remarked that some authorities claim that ancient manuscripts do not contain the word "rerum" but have simply "De verborum significatione." His understanding of the power of symbols, when expressed in words *and* things, relates to the idea that an ancient word has an iconic as well as a textual meaning. Emblems are thus a combined form in which texts can play with a rich intertext, in much the same way that icons may play with sophisticated genealogies of visual commentaries.
p. 759 The term is also related to language ethnicity ↳ issues when Mignault adds that "Tiberius was rather zealous about the elegance of words and rejected the term 'emblema' used in some decree of the senate, thinking that it should be changed and that a Latin term should be sought in place of the foreign one."[7] In this last case, the word is considered a foreign word that should not be employed in a Roman decree.

In Pierre Coustau's *Pegma cum narrationibus philosophicis* (1555), an emblem book authored by a French lawyer, the word used as a title for his collection of emblems, "pegma" (literally, a triumphal arch or a moveable pageant, used during processional triumphs), has genre-defining implications, as it was used by Mignault in his commentaries on Alciato's emblems. Alciato's title, *Emblematum liber*, was probably intended in the same way as Coustau used his *pegmata*: these emblems were used as collections of commonplaces and would add rhetorical brilliance to the speeches of orators.

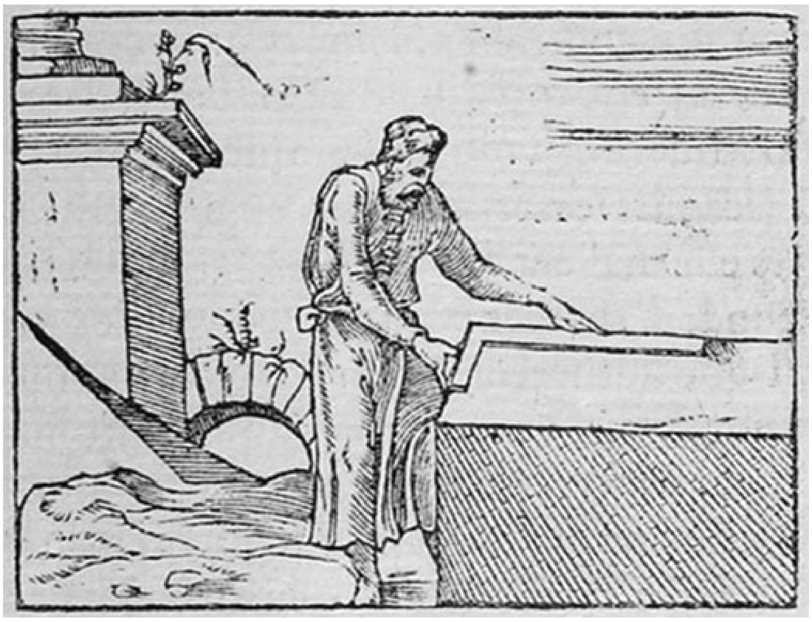
Since Alciato and Coustau were lawyers, the validity and relevance of this kind of lexicographical investigation can be confirmed by the philological practice of early modern jurists. To the list of these words shaped by humanistic study, we should add *parergon*. As Daniel Russell explains,

> The twelve books of [Alciato's] *Parergon iuris* were prepared between 1536 and his death [in 1550], and were published in groups in 1538, 1543 and posthumously. These hybrid compositions are discontinuous and marginal to Alciato's main interest in the law; these short chapters form a "collection" [of potential forms of legal arguments].... Alciato's introduction to these *parerga* ... explains the title of the work and compares these short hybrid commentaries that combine legal commentary with humanistic material to what ancient artists called "*parerga*" in the margins of their paintings. Alciato considered his *parerga* as marginal asides [*obiter dicta*[8]] uttered perhaps outside the context of his teaching, and he closes his explanation in the esoteric form of a distich from Agathon, to ask in effect whether "we are treating the accessory motif as we would treat the principal one and the principal motif as we should treat the accessory motif."[9]

His *Parergon juris* is a fine example of his contribution as a humanist to jurisprudence.

Using the techniques of philology and the widest possible range of historical sources to explicate the *Digest*, the creation of emblems is therefore not only a favorite pastime of legal scholars; emblems were also used to posit legal problems and stage arguments and counter-arguments in order to test legal theoretical issues. In this respect, the emblem *Bonus judex. In norman Lesbiam* (The Good Judge. About the Lesbian Rule),[10] by p. 760 Pierre ↳ Coustau (see Figure 42.1), uses the image of the Lesbian rule, an ancient carpenter's flexible measure that was used to adapt to the shape of stones and reproduce irregular curves, to represent the ideal of *epiekeia/aequitas*. The image comes directly from Aristotle's *Nichomachean Ethics* (10, 1137b, 29–30) which discusses equity in law: "The rule adapts itself to the shape of the stone and is not rigid, and so too a special decree is adapted to the facts." The Hungarian humanist Joannes Sambucus also devotes an emblem to the notion of *aequitas*, and the epigram comments on the necessity, for the ruler, to remain malleable and open to a considerable degree of case-by-case assessment and appreciation: "It is the task of a ruler and of those who are skilled in law to know what the laws prescribe, as well as what is becoming. The eye of the law is sharp as that of Lynceus, but the other, dazed eye is prominent, so that it can modify the strict one with respect to sentences. The republic does not call for someone too watchful or too soft: justice lies in the middle, and forgiveness finds favor. Then the wise sword will rule rightly over the world, by whose severe p. 761 bloodshed life is given."[11] The ruler should have a ↳ mixed vision, one eye being sharp and the other nearly blind, to counterbalance the rigor of the strict observance of the law. Sambucus calls for the moderation in the application of justice (*mitigatio juris*).

Figure 42.1



Pierre Coustau, *Pegma cum narrationibus philosophicis,* “Bonus Judex. In norman Lesbiam” (Lyon, France: Macé Bonhomme, 1555).

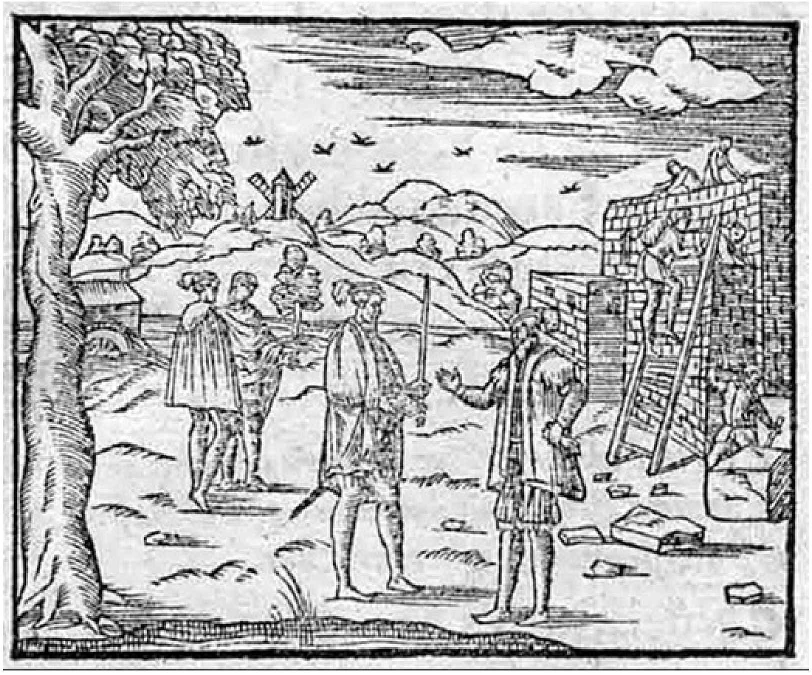
Courtesy of Glasgow University Library, Special Collections.

42.1 *Emblemata* Inserted in the Roman Law Reference Texts

Emblems are traditionally approached through book history. Often used as *alba amicorum*, emblem books also give insightful keys on how visual symbols were explained by marginal notes or inserted into dedication strategies by scholars performing the *peregrinatio academica* around Europe. As Manuwald highlights,[12] the role of the book as a physical object deserves attention as it plays a part in rituals such as oath-taking.

The case of the Senneton edition of the *Corpus Juris Civilis*, printed in Lyons between 1548 and 1550,[13] is a particularly telling example of how emblems may be inserted into the body of Roman law texts themselves. As a detachable ornament and movable sign, the emblem is grafted into a prestigious edition of the *Corpus Juris Civilis*: from the original size of the emblem book (a small *libellus*, whose format is either in quarto or in octavo, that is, a pocket book) to the five-volume in-folio monumental edition of the body of Roman law texts, the emblem is grafted on Code itself. The word “emblema” occurs in the prefatory epistle of the *Digestum Vetus* volume of the Senneton edition, the phrase “per imagines decoratus et mythicis emblematum picturis illustratum,”[14] meaning “decorated with images and adorned with emblematic pictures of myths.” Legal emblems are used as means of signaling as well as mnemonic tools. They interpret figuratively a body of written laws. The variegated uses of epigraphic and archaeological material show that the emblems of the Senneton edition build a genuine and original iconography. The illustration of the title *De operis novi nunciatione* (*Digest*, 39, 1) (see Figure 42.2) shows that the iconic part of the emblem is a close rendition of the legal text. The injunction “De novis operis nunciatione” is a formal procedure, a *manus injectio*, and the engraver has precisely depicted it: in the background, several masons are constructing an illicit building. The Senneton engraver shows a man with an open hand, preventing the building *per manum*.

Figure 42.2

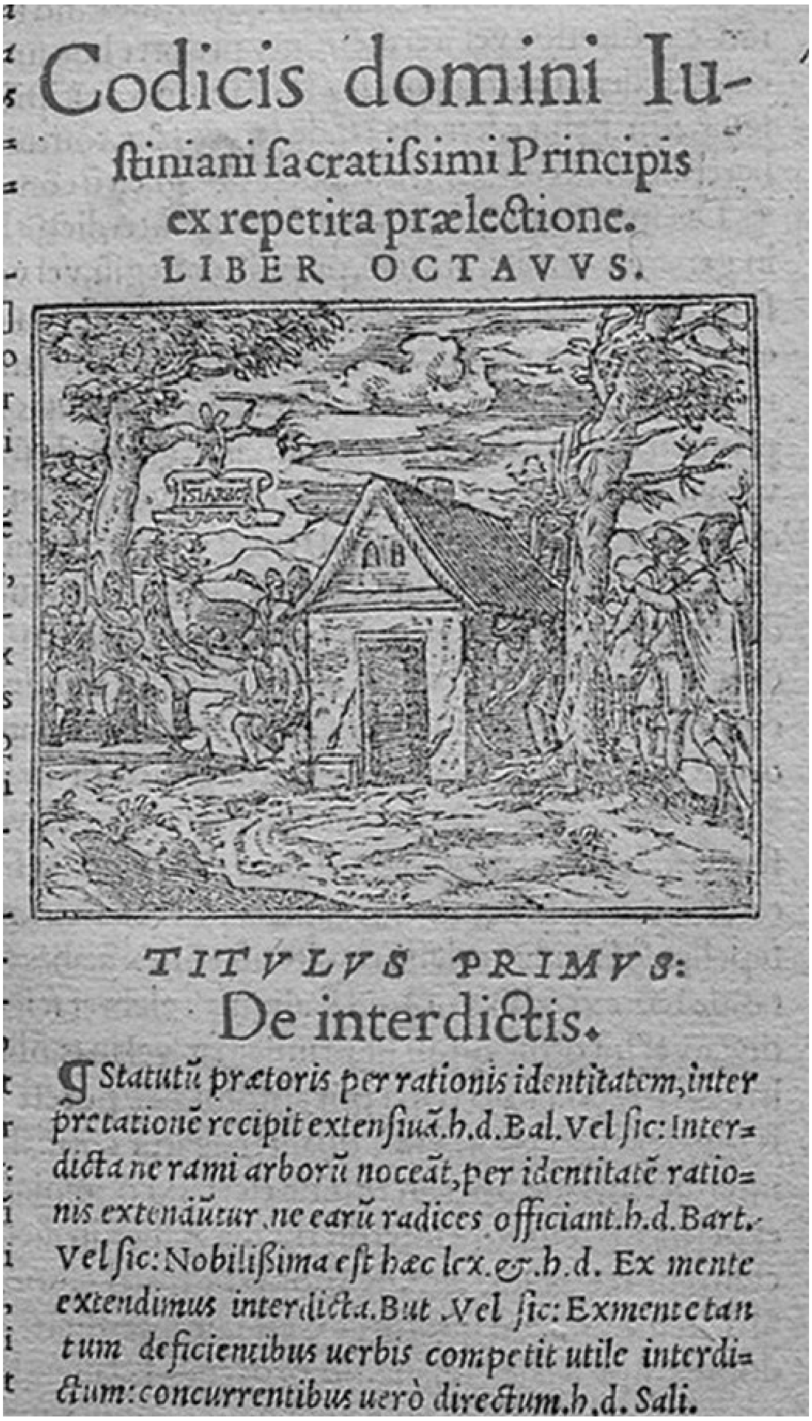


Emblem for the title *De operis novi nunciatione* (*Digest*, 39, 1) *Corpus Juris Civilis* (Lyons, France: Senneton, 1548). Bibliothèque de la Cour de Cassation, Paris.

Photograph by Valérie Hayaert.

Another example is the woodcut illustrating the title *De interdictis* (*Code*, 8.1.1.1) (see Figure 42.3), in which Aper complains that roots from the yard of his neighbor, a certain Agathangelus, are threatening the foundations of his house.[15] The emblem depicts the plaintiff pointing his index finger toward a tree growing too close from his house. He engages the Emperor, seated on his throne, to react. The engraver has added a textual sign, which reads “Si arbor,” the incipit of the imperial rescript: “Si arbor in alienas ædes impendit.” The written nature of this interdict is included in the emblem; it shows the letter of the law inside the icon. The legal text indicates that the praetor had written the interdict on his tablets. This detail exhibits a close rendition of the text, attentive to the exact wording of the law. In this refined edition, woodcuts often integrate legal texts and concepts; they also show a will to describe antique objects, rites and settings, promoting a new understanding of Roman legal history.

Figure 42.3



Codicis domini Iuſtiniani ſacratiſsimi Principis
ex repetita prælectione.
LIBER OCTAVVS.

TITVLVS PRIMVS:
De interdictis.

¶ Statutū prætoris per rationis identitatem, interpretationē recipit extenſiuā.h.d.Bal.Vel ſic: Interdicta ne rami arborū noceāt, per identitatē rationis extendātur, ne earū radices officiant.h.d.Bart. Vel ſic: Nobiliſsima eſt hæc lex.&.h.d. Ex mente extendimus interdicta.But. Vel ſic: Ex mente tantum deficientibus uerbis competit utile interdictum: concurrentibus uerò directum.h.d. Sali.

Emblem for the title *De interdictis* (Code, 8, 1) *Corpus Juris Civilis* (Lyons, France: Senneton, 1550). Permission: Bibliothèque de la Cour de Cassation, Paris.

Photograph by Valérie Hayaert.

p. 763

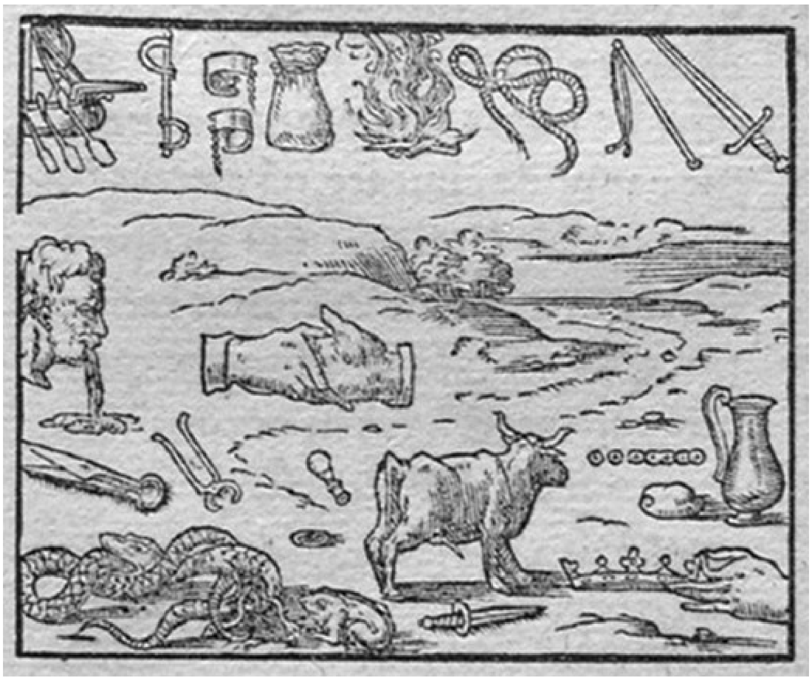
42.2

p. 764 ↳

Emblems as Mnemonic Devices

In the *Digestus* volume of the Senneton edition, the emblem adorning the first title of book 48 of the *Digest, De publicis judiciis* (see Figure 42.4), presents a disparate composition, heavily indebted to the hieroglyphic tradition. This unusually fragmented composition recalls the list of crimes subject to public infamy, which were submitted to special laws. As the legal text includes a list of eleven crimes, the engraving serves as an ingenious mnemonic tool to indicate a salient emblematic object for each of them. In the sky, occupying the upper quarter of the engraving, on a horizontal axis, a suite of objects is displayed; they symbolize the capital punishments for each of these crimes (galley bow, double-handed sword, irons, bag, fire, cord, whip, and executor sword). The landscape below is scattered with emblematic elements which are meant to recall each law: for instance, the profile of a vomiting head stands for the *lex Cornelia* law against poisoners; p. 765 the *dextrarum junctio* relates to the *lex Julia* against corrupted electors; the group ↳ consisting of a jug, a piece of bread, and coins refers to the *lex Julia de annona*, an Augustan law against merchants raising the market prices of foodstuffs or committing unfair practices in the sale of food. This example shows how a curious emblematic montage serves as a tool for memorizing a complex list of Roman interdicts. Early modern lawyers thought themselves more dependent on memorial arts than their contemporaries in other fields. Mnemonic precepts, as pragmatic tools, proliferated in law books. By using hieroglyphs as a new symbolic vocabulary adapted to Roman law, this *ars memorativa* has a powerful and striking effect on the memory. Vital to the study of the long compilations of Roman legal texts, mnemonic devices could help in presenting the topical arrangement of laws, using iconic emblems to reinforce general headings in legal texts. This art of memory disrupts the textual nature of Roman law by inserting in its body a storehouse adapted to the rules of a mnemonic game.

Figure 42.4

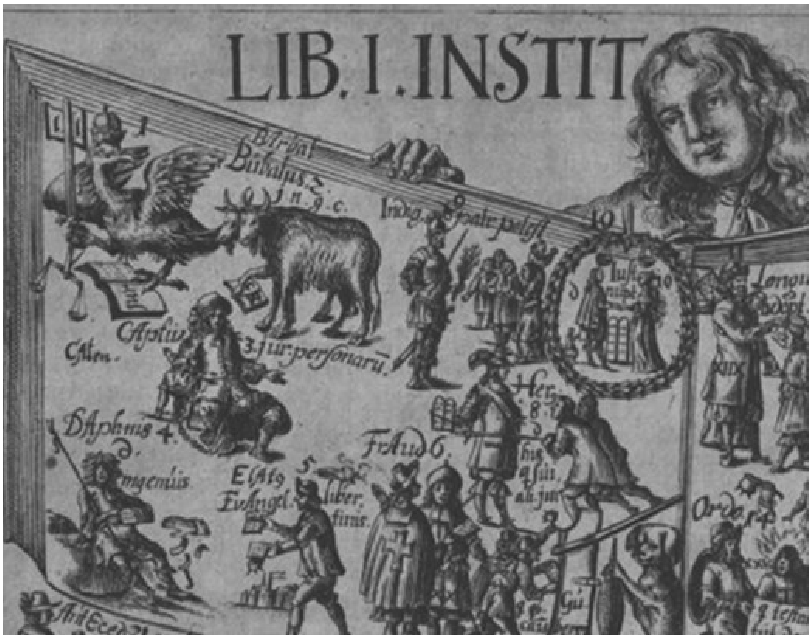


Emblem for the title *De publicis judiciis* (Digestus Novus 48, 1), *Corpus Juris Civilis* (Lyons, France: Senneton, 1548). Permission: Bibliothèque de la Cour de Cassation, Paris.Photograph by Valérie Hayaert.

Florence Vuilleumier Laurens has recently shown how Claude Mignault—who started as a prominent university teacher, then became magistrate, Doctor of Civil and Canon Law, and, finally, an important figure of the reformation of the university under the reign of Henri IV—continuously contributed to the elucidation and dissemination of Alciato's emblems.[16] The weight of his schoolbooks and the immense care with which he provided learned commentaries to Alciato's emblems on a very regular basis, for teaching purposes, as well as the close examination of manuscript notes about his teaching method offer important insights about the value of emblems and their link to moral philosophy in general.

The use of mnemonic images in legal disciplines is widespread and lasts throughout the modern period. Johannes Buno (1617–1697), a Lutheran clergyman, scholar, and educator born in Germany, created in 1672 a Memory book of the Institutes of Law (*Memoriale institutionum juris*).[17] The *Memoriale* is the first volume of a three-volume series[18] using pictorial mnemonics to help students to memorize the order of the titles and the content of Roman law reference texts. The titles, says Buno, are reduced to an arrangement in which their content and numerical order are indicated by images and pictures, corresponding to the things of which they are the signs. In Buno's case, legal mnemonics have been expanded and ambitiously designed: the schoolbook designed for memorizing the Code includes a series of twenty-two sophisticated double-folio-size illustrations using the technique of artificial memory (placing each object to remember in a memory room). Buno associates each title of the *Digest* with a combination of capital letters in red. For instance, the first title of the first book of the *Institutiones, De Justitia et Jure*, is marked in a marginal note by the lemma "ArmatA Aquila" and a note below says "*Gladium* et *libram* habet justitiae signa: et *librum* cui *jure* inscriptum" (The *sword* and the *scales* are visual symbols to depict Justice, as well as the *book* on which is p. 766 written the *Law*) ↳ (see Figure 42.5). Concepts in italics are figured by the striking image of a heraldic armed eagle in the top left corner of an accompanying broadsheet table, which recalls its initial location by reference to the order of the alphabet. Buno was convinced that mnemonics could be applied to all academic fields; he pursued what he called his "emblematic method" to teach the Bible, history, grammar, and the law. The visual mnemonic tool was then a technique overarching all disciplines: it echoes the stimulating debates of the time over the input of Ramism and the logical visualization of dichotomies to teach law.

Figure 42.5



Johannes Buno, *Memoriale institutionum juris* (Ratzeburg, Germany: Nissen, 1672). Double-folio-size illustration, hieroglyph designed for the title Inst. 1.1. with a heraldic armed eagle.Photograph by Valérie Hayaert.

42.3 Legal Emblems and Adages

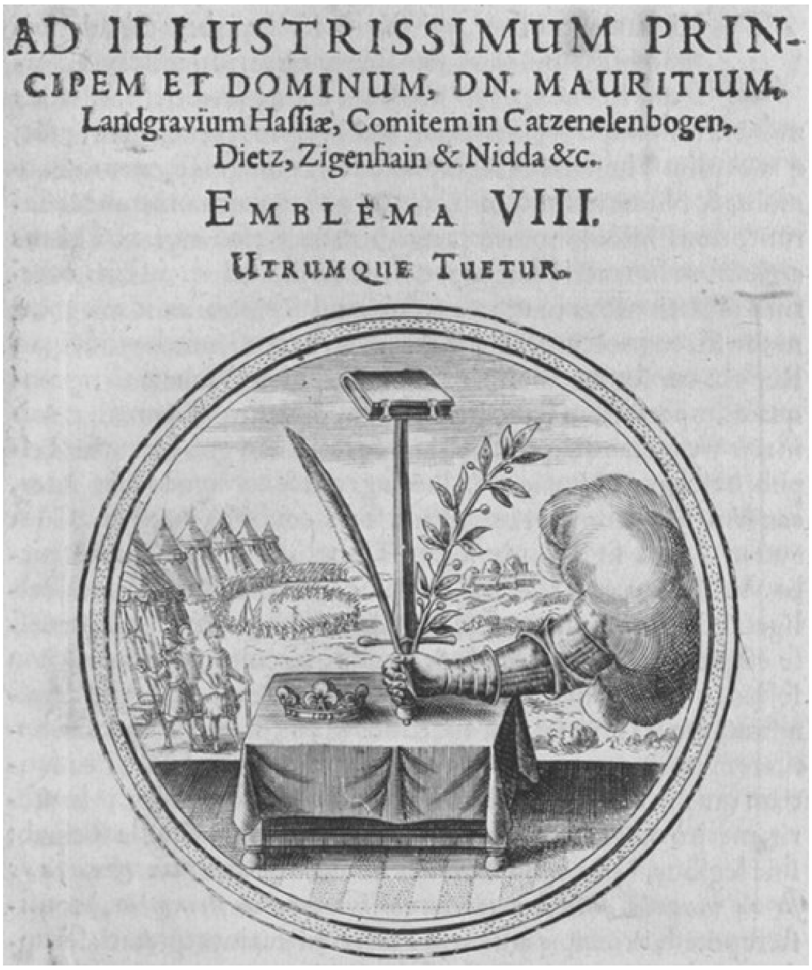
A constant feature of legal emblems is the incorporation of legal maxims and adages. Davis[19] has shown the longevity and variety of collections of legal maxims in a comparative perspective. Legal maxims have p. 767 evidential and argumentative functions, but they ↳ also serve to signpost the moral foundations of the law. Legal maxims, as markers of their own provenance, are not intended to deliver information by themselves; they serve as frames and warrants for argumentation developed in other utterances. As principles and underlying reasons of law, adages receive an emblematic treatment which deserves closer analysis. Legal adages had an important role to play in customary law and case law, drawing notably on the tradition of the *regulae* of the Roman jurists and the medieval *brocardia*. The adage *summus ius, summa crux* (extreme justice is extreme injustice) features as the title of an emblem by Nicolas Reusner[20] (emblem XXV, dedicated to the jurisconsult Simon Ostermann) and the legal adage *Lis litem, noxam noxa subinde parit* (quarrel breeds quarrel and hurt breeds hurt) appears in the epigram of the same emblem. The conjunction of these two legal adages serves to underline that justice should be enforced even against the letter of the law. Excessive and malevolent legal practice plays the letter of the law against its spirit. Reusner's epigram compares a goat trying to cross a narrow bridge surrounded by dangerous waters to the task of the judge, who should not entertain vain lawsuits and allow litigants to run constantly to the court. Instead, the last verses advise: "Be fair and avoid, as far as you can, sad courts, and hold sometimes the half as more valuable than the whole." This last verse includes again another adage, *Dimidium plus toto*[21] (The half is more than the whole), attributed by Erasmus to Hesiod, which is a lesson of moderation and justice. This adage recommends the *aurea mediocritas* in law. Legal emblems often use juridical adages for their brevity and sense of poetry as well as for their mnemonic form. Adages make visible other streams of transmission besides the linear apparatus of the legal text. As a detachable dictum, an adage helps to shorten the normal course of argumentation. Often highlighted by distinctive typography (italics or small capitals), the adage signposts and cross-fertilizes legal arguments by indicating several possible interpretative paths.

In some cases, an adage becomes a standard form of legal knowledge and is repeatedly used in the same context by emblem writers. That occurs, for instance, with the adage "Boni pastoris est tondere pecus, non deglubere" (It is of a good shepherd to shear his sheep, not to flay them); the motto is taken from Suetonius's life of Tiberius (32, 5), in which Tiberius answers with this adage to some governors who ask him to recommend an increase in the burden of provincial taxation. Those who shear are careful to leave a portion that allows growth to occur: those who skin leave nothing.[22] This adage soon becomes an emblematic commonplace to recall the warning against taxing the people excessively. Emblematic thinking promotes a reflective discussion about the dangers and pitfalls of juristic abuses. As visual tools of self-identification, emblems are used for personalized responses to and critiques of colleagues, and are imaginative playgrounds for witty attacks against vicious professional practices. In the wake of his p. 768 predecessors, Pierre Coustau devotes an emblem to the question of overtaxation in his *Pegma*[23]; ↳ Nicolas Reusner uses the adage as a title for his emblem 26 (book II) dedicated to the Jurisconsult Alexander Huntinus[24] and Jacob Cats borrows exactly the same image[25] to warn against the same abuse. This emblematic motive is widespread; it becomes one of the main *loci* of iterative remonstrances at the opening ceremonies held in Parliament by experienced magistrates. This example shows how emblems are incremental in nature, iterative but also original in their language, as they always add further subtlety to a well-known canvas. This theme will later inspire Cesare Ripa's *Iconologia*, in his personification of Taxation,[26] who is a muscular youth in rustic dress, wearing shears and standing in front of a lamb, representing the taxable public.

42.4 *Armis et Litteris*

The practical and moral relevance of emblems in teaching shared judicial values is an important aspect of their function and application. Emblems convey a professional ethos (*habitus*) along with rhetorical training for the professional decorum of humanist lawyers.[27] A perduring theme among legal emblems is to recall the famous definition of the Emperor Justinian as a warrior and man of letters: “Imperatoriam maiestatem non solum armis decoratam sed etiam legibus oportet esse” (Imperial majesty should be not only embellished with arms but also fortified with laws).[28] Ernst Kantorowicz[29] noted that the Justinian formula had been re-orchestrated in a new spirit by Renaissance emblem books. The Renaissance had a genuine ethical understanding of Justinian’s prologue, quite different from its medieval interpretation. In 1635, George Wither[30] represents the concept in an emblem picturing a sword protecting the Tablets of the Ten Commandments, with the motto “Lex regit et arma tuentur” (Law rules and arms protect) and the emphasis is now on the ideal virtues of the prince who, according to Wither, needs to be reminded that “The Law is given to direct, The Sword, to punish and protect.” The emblem praises the virtue of the ideal prince, patron of both arms and letters. The same lesson appears in Diego Saavedra Fajardo’s mirror of an ideal prince, with the motto “Non solum armis,”[31] in which the Justinian injunction is strongly connected to the p. 769 importance of royal wisdom as a tool for refashioning the polity. Another ↳ emblem explicitly dedicated to the Justinian theme of arms and letters is “Utrumque tuetur,”[32] invented by Jacob de Bruck-Angermundt, a humanist jurist from Breslau; his *pictura* shows an arm embowed in armor holding a goose quill, a branch of p. 770 laurel tree, and a sword surmounted by a book (see Figure 42.6). The epigram explains that the quill ↳ and the laurel branch press the sword because the prince must protect letters, govern with reason, and rule under the sane conjunction of arms and letters. The emblem commentary extensively quotes Justinian’s preface to his *Institutiones* and insists on the ingenious invention of the emblem: a book, says Bruck, has been attached on the sharp spike of the sword to show that right reason and ethical advice rule the use of arms.

Figure 42.6



AD ILLUSTRISSIMUM PRINCIPEM ET DOMINUM, DN. MAURITIUM,
Landgravium Haſſiæ, Comitem in Catzenelenbogen,
Dietz, Zigenhain & Nidda &c.
EMBLEMA VIII.
UTRUMQUE TUETUR.

Jacob Bruck, *Emblemata moralia et bellica* (Strasbourg, France: Jacob van der Heyden, 1615), emblem VIII “Utrumque tuetur.” Archive.org.

Jacob de Bruck-Angermundt devotes a second emblem to the necessary balance between Justice and laws. Emblem XXIII, “Durant aequa” (Equal things perdure) is illustrated by an even pair of scales, weighing a chained book of laws against a nude executioner sword. In the background, a trial scene is visible. The emblem’s commentary recalls the ethics of the good judge and the basic rule against bias: “Nemo in propria causa judex esse debet” (no one should be a judge in his own cause). The Bible[33] is quoted extensively: “Videte quid faciatis: non enim hominis exercetis judicium, sed Domini, et quodcunque judicaveritis, in vos redundabit. Sit timor Domini vobiscum, et cum diligentia cuncta facite. Non est enim apud Dominum Deum nostrum iniquitas, nec personarum acceptio, nec cupido munerum” (Take heed of what you do, for you exercise not the judgment of man, but of the Lord and whatsoever you judge, it shall redound to you. Let the fear of the Lord be with you, and do all things with diligence, for there is no iniquity with the Lord our God, nor respect of persons, nor desire or gifts.) Emblems always display an art of quotation: the length of the quotes, their faithfulness to the original, and their insertion at a specific moment are always precisely gauged.

The commentary on the emblem uses a rich array of exempla to illustrate the right use of justice, according to equity. The quality of an emblem is often dependent on the richness and the variety of its quotes: these are part of the *ornatus*, the art of rhetoric according to the canons of the time. Bruck’s emblem recalls the ethics of the good ruler, driven from the equal cult of God and Justice. Emblematic analogies link the ethics of the Good Prince, displayed lavishly in the genre of mirrors of Princes, to the ethics of the good judge.

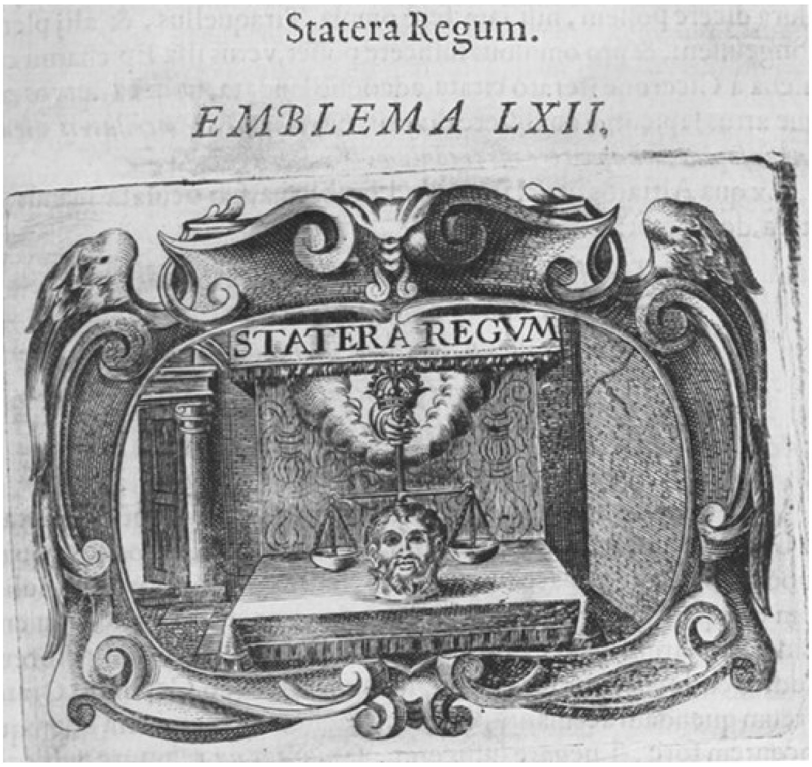
Using common frameworks, shared exempla, and vivid and sometimes gruesome images, emblems produce more than a doctrinal discourse. Emblems are pervasive because of their cognitive nature: as mental images, they can be used and attached to many contexts; their iconic nature is not necessary per se, they infuse the learned circles of jurisprudents as a marker of higher election and professional dignity.

Jacob de Bruck-Angermundt depicts in another emblem (emblema XXIV, "cavet futuris") the relations between the prince and the laws. The *pictura* shows an open book of laws, with the inscription "Lex norma justitia," covered by a Lesbian rule, displayed with two lictors' fasces on the same table. The commentary stresses that the prince should act as a *lex animata* himself, he should literally embody the law. Natural equity requires, sometimes, that the prince should conform to his own laws, in order to make his subjects more inclined to observe them. Bruck quotes the following verses by Claudian to illustrate this idea: "In commune jubes si quid, censesve tenendum/Primus jussa subi: tunc observantior aequi /Fit populus, nec p. 771 ferre vetat, cum viderit ↳ ipsum/ Auctorem parere sibi"[34] (If you make any law or establish any custom for the general good, be the first to submit yourself to it: the people become more observant to justice, and do not refuse to submit to the laws when they see them obeyed by their enactor). De Bruck insists that he who has laid down the law for someone else should apply the same law to himself. Emblems often stress the paradoxical nature of the judge's ethics by using binary symbols, oxymora, and dialectical quotes. De Bruck quotes Plato's *De legibus*, book IV (715d), where the philosopher foresees the end of the state, in which the law does not dominate the magistrates but the magistrates dominate the law. Even if, says the author, Ulpian's famous adage argues that the prince is not bound by the laws (*Princeps legibus solutus est*, D. 1, 3, 31), the emblem underlines that the prince has a duty to uphold the laws and that it is proper for such a great majesty to comply with the laws from which he himself seems to be exempt. The prince's ethical contract is built on a similar analogy, the one that summarizes the judges' ethics: it is because the judge passing a judgment is overlooked by God himself, depicted above him as the ultimate judge (in *Last Judgment* scenes present in courtrooms) that the image of divine jurisdiction reminds him that in so doing he must act justly. The intended message is clear: as he will himself be judged on Doomsday for whatever judgment he has passed, he must take heed of what he is doing. The particularly coherent imagery of the double delegation process applies to judges and princes alike. This argument was made visible by images of justice in courtroom spaces of the time, but similar ethical analogies would also pervade emblem literature.

42.5 *Audi et alteram partem* (Hear the Other Side)

The legal maxim “Audi alteram partem,” claiming that a judge or adjudicator in disputes should allow both parties to be heard and should listen to both points of view, is often subject to substantive reflections and inventive emblematic creation. The emblem created by the Spanish jurist Juan de Solorzano Pereira, called “Statera regum”[35] (balance of kings) (see Figure 42.7) is a curious montage which gives flesh to this principle: the *pictura* shows the two parts of the scale, equally balanced, next to both ears of a man’s face: the scales are held by a crowned head protruding from a cloud. In the following commentary, Solorzano describes very precisely his iconic invention: bursting out from a human head, which is the seat of the mind, between two ears, he has figured nature, so that no one believes or weighs anything before he has examined both alternatives in the scales of his mind. Solorzano then quotes a Pythagorean sentence in verse by p. 772 Ausonius, which states that the upright and wise man “weighs himself by the test of a just balance: ↳ there must be no hollows, no projections; the angle must be formed of equal lines and the rule not deviate a jot.”[36] The emblem commentary uses a wide range of sources to reinforce the principle of fairness in hearings and impartiality. Among many authorities cited, a famous couplet from Seneca’s *Medea* is particularly highlighted: “Who judges, one side unheard, although he judges justly, has not been at all just” (*Qui statuit aliquid parte inaudita altera/Aequum licet statuerit, haud aequus fuit*).[37] The main sources recorded by Solorzano belong to the classical Greek and Roman worlds: the rule *audi alteram partem* was both a rule of justice and a rule of wisdom. The maxim does not occur at all in the *Digest*. To hear both sides, plaintiff or prosecutor and defendant, was a part of the Roman *mos maiorum*; it later became a maxim of popular wisdom and a ↳ guide for judicial ethics.[38] During the modern period, the maxim *audi (-te) alteram partem* p. 773 is often inscribed on the walls of courthouses (Amsterdam Town Hall, at the entrance to a magistrate’s court) but also in civic buildings in Germany and the Netherlands. When emblems as sources of juristic wisdom are applied to courthouse architecture, their monumental display in gold letters implies that they were visible and articulated in the spaces where courts performed. Emblems are to be understood as fragments of living monuments where the ethics of the good judge are displayed to guide everyday practices. They act as deontological images, as they recall judicial rituals and a specific orthopraxis. Their materiality and diversity of functions allow them to shift perception frames and to question whether the space where the trial occurs is really attuned with divine justice.

Figure 42.7


Statera Regum.
EMBLEMA LXII.
STATERA REGVM

Juan de Solorzano Pereira, *Emblemata regio politica* (…) (Madrid, Spain: Garcia Morras, 1653), emblem LXII “Statera Regum.” Archive.org.

42.6 Equality for All: Laws Are Like Spiders’ Webs

Legal emblems are not limited to high culture or the professional concerns of lawyers. Emblems are everywhere, and some of them are also pervasive in popular culture. A telling example is the dictum attributed to the pre-Socratic Scythian philosopher Anacharsis, who laughed at the legislator Solon for thinking that he could check the injustice and rapacity of the citizens by written laws: “Laws are just like spiders’ webs; they hold the weak and delicate who might be caught in their meshes, but they are torn in pieces by the rich and the powerful.”[39] This quotation from Plutarch *Lives*, also transmitted by Valerius Maximus (*Facta et dicta memorabilia* 7, 2, 14) soon became a commonplace featuring, for instance, in Erasmus’s *Education of a Christian Prince* (1516), and it was regularly used by emblem authors as a warning that rulers must obey the same laws that govern the people. Pierre Coustau uses this image in his emblem “Ad araneam, vulgatum ex Diogene. In corruptos judices”[40] (On the spider, after Diogenes’s dictum. Against corrupt judges), where the *pictura* opposes a spider web in which flies have been caught to an opulent safe symbolizing the riches of the powerful. The same comparison is used by Claude Paradin in his *Devises Héroïques* (1557) with the motto “Lex exlex”[41] (The law, or the outlaw). Paradin stresses that the rich are favored over the poor by corrupt magistrates who falsely interpret the laws to let the wealthy escape its rigors. The *pictura* is reduced to an iconic spider web, without any flies caught in its meshes. The motive was such a commonplace that the picture of a spider web would suffice to recall the famous dictum. In his *Premier livre des emblèmes* (1550), Guillaume Guéroult develops a short fable around this exemplum of the need for social justice: p. 774 ↳ his emblem “Les riches s’exemptent des loix, mais les povres y demeurent” is a lively moralizing tale that reflects the style of Aesop’s fables evidencing the injustices of the world. The engraving of his emblem shows a spider web in which flies are caught, but wasps manage to break through. The theme had a great impact in vernacular books of emblems, and Guillaume de la Perrière, a French jurist from Toulouse, also uses it in his *Théâtre des bons engins* (1544): the commentary on emblem XLIX[42] estimates that “La loy n’ha lieu que sur pauvre indigence, / Les riches ont de mal faire licence” (Law only applies to the poor, the rich are free to do evil). Joachim Camerarius also adopts the comparison attributed to Anacharsis in his emblem “Violentior exit”[43] (The more violent escapes) with the following epigram: “Innodat culicem, sed vespae pervia tela est; /Sic rumpit leges vis, quibus haeret inops” (The web entangles the gnat, but to the wasp throughout is pervious; so force breaks laws, to which the helpless is held bound in chains). The Dutch jurist Florentius Schoonhovius offers a more elaborate variation in his emblem LXVIII, *In corruptos judices* (Against corrupted judges) where the *pictura* stages a judge being corrupted by Mercury himself, god of commerce and money, with a spider web attached to a decayed wall on the left part of the engraving.[44] This theme is a widely shared example of emblematic vitality: as an easily figurable dictum, it is particularly well represented in emblem literature. Far from producing an erudite symbolic creation, this theme is well suited for a popular audience; it may be conveyed by a popular fable-based emblem book and reach a wider public.

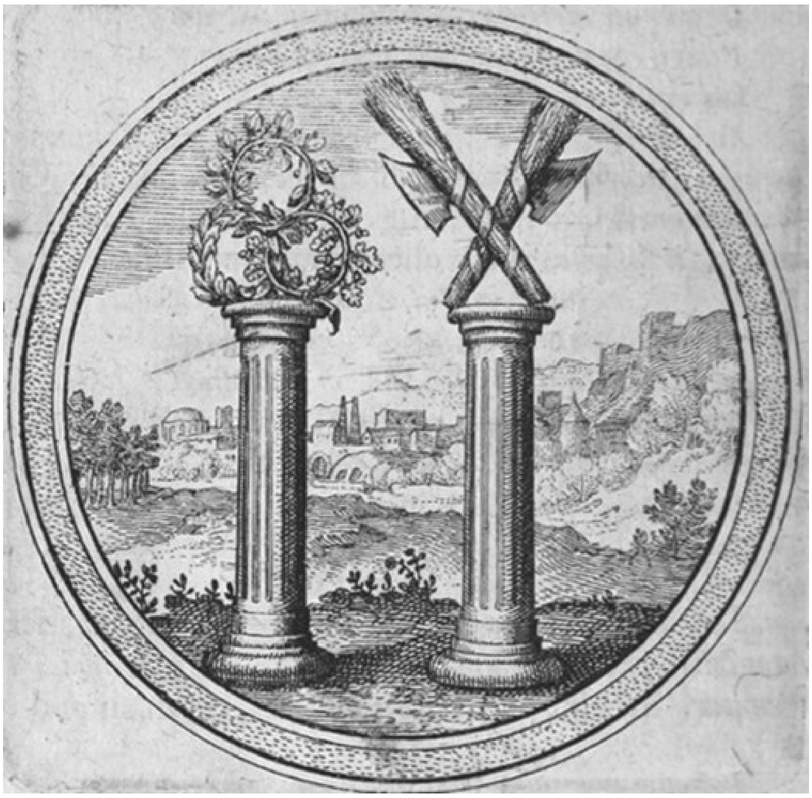
42.7 Against the Multitude of Laws and Trials

A recurring complaint among legal emblems is to criticize the multitude of laws and trials. Pierre Coustau, in his *Pegma*, warns against the endless nature of lawsuits (*In immortalitem litium. Ex hieroglyphicis Aegyptiorum*)[45]: he ingeniously applies the symbol of the ouroboros, the snaked coiled in on itself, to describe the never-ending nature of trials. Solorzano also dwells on a problem he knows well, as a jurist, and devotes one of his emblems to this thorny issue: “Legum litiumque multitudo exitialis”[46] (A multitude p. 775 of laws and lawsuits is destructive). A famous quote by Tacitus[47] opens the explanatory ↳ text of the emblem: “Corruptissima republica plurimae leges” (When the republic is at its most corrupt, the laws are more numerous). Solorzano stresses that the number of laws especially increases in times of crisis and in periods of intense conflict. The abundance of so many edicts, constitutions, and new laws brings extreme confusion. Solorzano quotes in full an epigram by the Welsh humanist John Owen about *Legum nullitas* (Law’s uselessness): “Condidimus leges quam multas! Quam prope nullas. /Nam si servatur nulla, quid ulla valet ?/ Ut leges serventur, adhuc lex unica fiat:/Haec cito facta foret lex; cito fracta foret”[48] (We have drafted many laws, but laws without any value or nearly any! For if no law is respected, what is their value? May the law become unique in order that all the laws may be observed. But this law, as soon as it will be drafted, will be infringed right away). Solorzano’s commentary then refers to the ideal brevity of the model of the twelve tables, the very foundation of Roman law—written in an exceedingly brief and elliptical style, cut on ivory tablets, held visible on the forum and praised by Cicero as being easily memorized by schoolboys—as a *carmen necessarium* superior to all philosophy. During the early modern period, jurists both of civil and common-law traditions were deeply concerned about the inconveniences of the ever-growing multitude of laws. Numerous projects were devoted to systematizing and rationalizing the laws. In this case, the emblem offers a tribune for a critical view of the administration of justice, as well as a hymn to poetic concision.

42.8 The Ethics of Punishment

In seventeenth-century Germany, Julius Wilhem Zincgref published his *Emblematum Ethico-Politicorum Centuria*, taking up the tradition of the mirror for princes, dedicated to the ruler Friedrich V, the Elector Palatine. Outlining the basic principles of conduct for rulers, Zincgref focuses notably on the ethics of punishment. Under the motto “Nititur his Regnum”[49] (On these Power rests) (see Figure 42.8) is an ingenious picture showing two columns, one crowned with three crowns (laurels, olive tree, and oak) representing the column of honor and the other crowned with lictors’ fasces, the column of Infamy, as a way to proclaim that both principles, Honor and Punishment, are crucial for maintaining peace and order in a kingdom. The following commentary stresses that the emblem originates in *Digest* 1.1.1, as the art of law is meant to “make good men good through fear of punishment, but also by the encouragement of reward; aiming at a true, and not a pretended philosophy.”[50] The mix of fear of punishment and exhortation is underlined by the lawyer Ulpian as a carefully balanced dual principle. Reward forms the counterpart of p. 776 punishment. This idealization of the Roman kingdom stands as an ↳ iconic binary symbol for the appropriate exercise of justice. Many emblems about justice highlight the necessity for providing examples of princely virtues, referring to the necessity for establishing a code of conduct.

Figure 42.8



Julius Wilhem Zincgref, *Emblematum ethico-politicorum centuria* (Frankfurt, Germany: Theodor de Bry, 1619), emblem 48 “Nititur his Regnum.” Archive.org.

Another symbol reflecting on the ruler’s ability to punish deserves attention: Juan de Borja chooses the motto *Iracundiam cohibendam*[51] (Anger must be restrained) to insist on the necessary conjunction of patience and punishment. The source comes directly from Plutarch (*Roman Questions*, 82): “Why are the rods of the praetors carried in bundles with axes attached? Is it because this is a symbolic indication that the temper of the official should not be too quick or unrestrained? Or does the deliberate unfastening of the rods, which creates delay and postponement of his fit of temper, oftentimes cause him to change his mind about the punishment? Now since some badness is curable, but other badness is past remedy, the rods correct that which may be amended and the axes cut off the incorrigible.” The emblem’s *pictura* shows a representation of the lictors’ fasces, a bundle of rods from which an axe is projected, symbol of the right to decide life and death over subjects, and used as an ensign worn by Roman praetors. The commentary stresses the need to pause and allow oneself time for deliberation before inflicting punishment. As time is needed to remove the axe from the bundle of rods, time is equally needed to decide whether to inflict capital punishment or not.

42.9 Emblems and Legal Satire

Emblems are frequently a vehicle of satire, in the wake of Martial’s epigrams. Many of Pierre Coustau’s emblems complain about sleeping, greedy or libidinous judges. The *pictura* of the *pegma* “On the statue of Bacchus. Against fat-cat judges who got their place for a price”[52] shows Bacchus himself presiding over a tribunal, and the two following epigrams voice a severe criticism of court disorders. The ironic tone is filled with invective: “And you are called the lawgiver of polity. How come you have been voted onto our benches of justice? (...) Yes, our bench is full of indolent donkeys.” Satirical emblems often arise from Coustau’s legal experience.

Andrea Alciato had already demonstrated this way of using emblems, at times revealing his personal involvement in a particular case. As Denis Drysdall has amply shown, this is the case for Alciato's emblem "Bonis a divitibus nihil timendum,"[53] in which Alciato recalls his own dispute with bad neighbors who blocked the light from his house; he creates an emblem that serves as a cry of protest.[54] In close connection to this personal emblem, Alciato discusses a legal problem in his treatise *De verborum significatione*[55] as an example of how the law may allow a man who wants to build a sumptuous house, to sell the adjacent property. Alciato's emblem thus refers to a specific dispute that he launched to protect his house from being shut out of its light (see Erasmus's adage 4.6.8 *Officere luminibus*). This example shows that Alciato's emblems sometimes relate to his own personal situation. They are the starting poetic point for a wider discussion of legal arguments. Alciato's emblems are deeply rooted in his research on Roman jurisprudence, but they may also reveal personal attacks, all the more efficiently since their power lies in a particularly salient satirical verve.

The early modern tradition of the emblem book offers a fertile ground for uncovering the renewal of legal ethics during the Renaissance. Andrea Alciato was first and foremost a lawyer, and juridical themes abound in his *Emblematum libellus*. Later emblematists forged visible figures of norm and law, which stage and enact the rites and harmony of a living legal visual tradition.

Inserted into the body of legal reference texts or used as ingenious mnemonic devices, emblems played a role in the *ars memorativa* deployed by legal educators. In the case of Johannes Buno discussed in Section 42.2, visual images were designed especially to help fix the order of titles in the *Digest* and their contents. Emblems and symbolic places would serve as topical frameworks, headings for the reference texts, and notable visual commonplaces for highlighting important issues. The emblematic quality of memory images was valuable for the jurist, who could reconstruct an entire legal text, speech, or case. The importance of emblems in transmitting law and the imaginary representation of legality was key for building a professional ethos in the humanist *respublica jurisconsultorum*. Emblem books provided shared judicial values, norms of conduct, and signs of office. The early history of legal emblems requires being attentive to the profound multivalence of their form and structure: their prolixity of applications and the variegated ways in which images and texts illuminate each other and provide numerous examples of making, seeing and saying judicial ethics.

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Notes

1 Suzanne Berger, *The Art of Philosophy: Visual Thinking in Europe from the Late Renaissance to the Early Enlightenment* (Princeton, NJ: Princeton University Press, 2017).

2 Hessel Miedema, "The Term *Emblema* in Alciati," *Journal of the Warburg and Courtauld Institutes* 31 (1968): 234–250.

3 Florence Vuilleumier Laurens, *L'Université, la robe et la librairie à Paris: Claude Mignault et le Syntagma De Symbolis (1571-1602)* (Geneva, Switzerland: Droz, 2017).

4 Claude Mignault, *A Treatise on Symbols*, in *Theoretical Writings on the Emblem: A Critical Edition*, ed. and trans. Denis Drysdall (1573). http://www.emblems.arts.gla.ac.uk/Mignault_syntagma.html. See in particular "On the emblem" (42) and "What emblem means, derivation of the usage, how the term may be understood literally, and how figuratively" (43).

5 Ibid.

6 See Denis L. Drysdall, "A Lawyer's Language Theory: Alciato's *De verborum significatione*," *Emblematica* 9 (1995): 269–292.

7 Mignault, *Treatise on Symbols*, note 38. See http://www.emblems.arts.gla.ac.uk/Mignault_syntagma.html#to_engn38

8 Andrea Alciato uses the phrase *obiter dicta* in the dedicatory epistle (1536) of his *Parergôn juris libri duodecim* (Lyons, France: Sébastien Gryphe, 1548).

9 David Russell, "Emblems, Frames, and Other Marginalia: Defining the Emblematic," *Emblematica* 17 (2009): 1–40, 6 (citing Valérie Hayaert, *Mens emblematica et humanisme juridique* (Geneva, Switzerland: Droz, 2008)).

10 Pierre Coustau, *Pegma cum narrationibus philosophicis*, "Bonus Judex. In norman Lesbiam" (Lyons, France: Macé Bonhomme, 1555), 71.

11 Joannes Sambucus, *Emblemata* (Antwerp, Belgium: Christophe Plantin, 1564), 187, translation of the epigram of the emblem *Aequitas*.

12 See Henrike Manuwald's chapter, "*Book History[oxfordhb-9780190695620-e-3]*," in this volume.

13 Hayaert, *Mens emblematica*, 187–217.

14 *Digestum Vetus, D. Justiniani Imp. Aug*. (…) *Tomus Primus* (Lyons, France: Senneton, 1550), preface (Bibliopolae praefatio).

15 Code 8.1.1.1: “Emperor Alexander to Aper, a veteran. Since you say that the roots of trees situated and growing in the neighboring yard of Agathangelus threaten the foundations of your house, the president will settle the matter according to equity in pattern of the interdicts, which the praetor has written on his tablets, relating to a tree hanging over another’s house, or to a tree hanging over another’s field, and which show that a neighbor should not be injured even by trees. Promulgated March 26 (224).”

16 Laurens, *L’Université, la robe et la librairie à Paris*.

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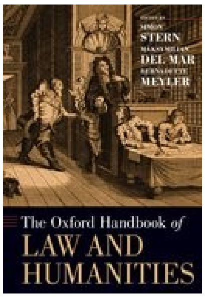

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CHAPTER

43 Video as Text/Archive

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Abstract

This chapter focuses on a few issues related to video evidence and law, especially with respect to American law. The first issue is the history of the use of video evidence in court. The second issue involves constitutional protections regarding the state's use of surveillance cameras. The chapter then turns to the Supreme Court case *Scott v. Harris* to raise concerns about the use of video evidence as not just proof but "truth." These are of course just a sampling of the issues that the topic of video evidence could raise. The hope is that this chapter will spur further inquiry on the part of the reader.

Keywords: video, surveillance, Fourth Amendment, First Amendment, sousveillance, policing, evidence

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43.1 Introduction

WE live in a time of cameras, a time of video, and a time when both can be archived easily and relatively cheaply in perpetuity.

This is certainly true of surveillance cameras, both public and private. In many ways, being under the watchful gaze of a camera is the new "normal." Consider New York City, which partnered with Microsoft Corporation to roll out the Domain Awareness System. The Domain Awareness System, which was probably not *intended* to sound like something from George Orwell's dystopian novel *1984*, aggregates and analyzes data from approximately three thousand surveillance cameras around the city, and allows the police to scan license plates, cross-check criminal databases, measure radiation levels, "and more."[1] As the then mayor said in announcing the surveillance system, which many speculate had already been in use for about a year, "We're not your mom-and-pop's Police Department anymore."[2]

At the time, the Domain Awareness System was merely the latest iteration of video surveillance in New York City. Video cameras in New York City date at least to 1973, when cameras were installed in Times Square. A decade later, there were approximately seventy-six cameras monitoring Columbus Circle. By 2006, lower Manhattan—the epicenter of world finance—could boast approximately 4,200 public and private surveillance cameras. As one journalist put it, by 2010 cameras were so pervasive that for any visitor to Times Square, the odds were "pretty good" that he or she was being watched. The journalist added: "[Cities] used to be places to lose yourself in the thrilling anonymity of a crowd. ... It's hard to adjust to the idea that cities—New York in particular, p. 780 ↳ and Times Square most of all—are now places where unseen watchers monitor your every move."[3]

Nor is the ubiquity of video cameras limited to New York. Video surveillance has become routine in other cities as well. Washington, DC has consolidated over five thousand cameras into one network called the Video Interoperability for Public Safety. Chicago, with at least 2,250 surveillance cameras, has Operation Virtual Shield, which includes biometric technology. Baltimore has CitiWatch, which includes over four hundred cameras equipped with low light, pan, tilt, and zoom capabilities. Consider this description of the Real Time Crime Center in Fresno, California:

> On 57 monitors that cover the walls of the center, operators zoomed and panned an array of roughly 200 police cameras perched across the city. They could dial up 800 more feeds from the city's schools and traffic cameras, and they soon hope to add 400 more streams from cameras worn on officers' bodies and from thousands of local businesses that have surveillance systems.[4]

Even small towns have turned to surveillance cameras. A survey from just under a decade ago listed over two hundred towns in thirty-seven states that were either using or planning to use public surveillance cameras.

Video cameras are also pervasive in other countries. In many respects, the United States is still catching up to Great Britain, which has been called "the champion of CCTV surveillance." The Government there has access to between "two and three million cameras ... creating more video images per capita than any other country in the world." Indeed, it was recently reported that the global CCTV market is expected to reach $24 billion by the year 2026.[5] Or consider Japan, where security cameras are said "to number in the millions ... making it safe to assume that whoever you are, wherever you may be, whatever you're doing, you're being watched, by something if not somebody."[6]

While the sheer number of video cameras is staggering, even this fails to capture their technological reach. Cameras are being combined with facial recognition technology and even gait recognition. They are being attached to drones. And they are becoming more powerful. Already there exists "eye in the sky" technology that can "track every vehicle and person across an area the size of a small city, for several hours at a time."[7]

p. 781 And these are only the government-owned, or at least government-run, video cameras. Walk into any department store or any bank anywhere in the world, and it is very likely you are being watched. Other forms of monitoring are also on the rise. Microphone surveillance is becoming increasingly common, including on public buses.[8] Robot vacuum cleaners secretly map out our apartments and houses, ready to share the information with the highest bidder.[9] Electronic assistants like Alexa and Google Home do not just listen to our requests; they also record and store them.[10]

Finally, with our smartphones, we are video-recording each other. The observation made by the Supreme Court in its recent decision *Riley v. California*, in which it ruled that law enforcement officers do not have an automatic right to conduct warrantless searches of iPhones found on arrestees, bears repeating: smartphones are "now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy."[11] We are using these devices as video cameras, capturing and disseminating images—on Facebook, on Snapchat, on YouTube, on Twitter—at a rate beyond dizzying. Some of us record vacations and graduations and weddings and our pets. Others use video recorders on smartphones for sexting and revenge porn. Either way, almost all of us have become auteurs, voyeurs, and purveyors of video.

If all of this brings to mind Foucault's panopticon, it should. Recall that Foucault was in fact expanding upon Jeremy Bentham's imaginary panopticon, an ideal prison where prisoners are housed in cells in a circular building, at the center of which is an observation tower placing prisoners under constant perceptual surveillance—perceptual, because the prisoners themselves are unable to tell when they are actually being watched and when they are not. Observation, even when invisible or imagined, becomes power. Foucault's contribution was to recognize that the physical edifice of a prison for carrying out surveillance had long become unnecessary; surveillance has been extended to other mechanisms that are to be found in the social body. Undoubtedly one such mechanism is the ubiquity of video cameras.

Of course, if the panopticon is ultimately about state power, the widespread availability of cameras has also ushered in the possibility of "sousveillance," the term Steve Mann coined to describe the act of "[observing] or recording by an entity not in a position of power or authority over the subject of the veillance."[12] Increasingly citizens are engaging ↳ in "sousveillance," turning their video cameras back on the state. There are even groups which, dissatisfied with state's seeming indifference to police violence, engage in organized "copwatching," arming themselves with video cameras to document and disseminate videos of police officers using excessive force or violating rights.[13]

Given the ubiquity of video surveillance—of the state watching us, of us watching the state, and of us watching each other—it makes sense that a volume on law and the humanities would offer a chapter on video evidence. In fact, when it comes to the law, the role of images, especially filmic images, is undertheorized. As Professor Jessica Silbey has written:

> Despite the proliferation of film as a basic tool of communication in our digital age, it remains rare to hear of legal scholarship, case law, and legislative initiatives analyzing film's role as a legal tool or constitutive part of legal culture. Why is this? One reason may be because lawyers and judges are word people and not picture people. Thinking in terms of images as building blocks for legal arguments is not how lawyers and judges are trained. We might use chalk to diagram a room or a chase. We might use photographs to identify suspects. But the nuts and bolts of law study and practice are words, not pictures. Another reason may be that too many lawyers and judges (ironically enough) believe images are less precise than words. We are uncomfortable with the maxim that "a picture is worth a thousand words." Which words? And how can I shape them, direct them, cross-examine them? This is precisely the right worry to have.[14]

Professor Silbey is right that filmic evidence is undertheorized. But the truth is there is almost too much to say about video evidence, especially in one chapter. Rather than attempt to cover it all, this chapter instead focuses on a few issues related to video evidence and law, especially with respect to American law. The first issue is the history of the use of video evidence in court. The second issue involves constitutional protections regarding the state's use of surveillance cameras. The chapter then turns to the Supreme Court case *Scott v. Harris*[15] to raise concerns about the use of video evidence as not just proof but "truth." Again, these are just a sampling of the issues that the topic video evidence could raise. The hope is that this chapter will spur further inquiry on the part of the reader.

43.2 Video/Evidence

Video evidence has become so commonplace—we expect surveillance footage, we are not sure of the truth without it—that it is easy to forget that video evidence has a history. It does. Perhaps unsurprisingly, it begins not with video but with photography. This history is traced below.

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43.2.1 History

As Jennifer Mnookin has documented, the use of photographic evidence in court can be traced to the very origins of photography.[16] Because photography was rarely available before the 1850s, photographic evidence was rarely offered as evidence in legal proceedings. By the 1860s, however, “the widespread appreciation of paper photographs, inexpensive tin types, photographic calling cards (known as *cartes de visites*), and three-dimensional stereoscopic images had brought a thriving photographic industry into existence.”[17] Its admission into courtrooms soon followed.

In the United States, the use of photographic evidence in judicial proceedings coincided with the technological development of a new collodion carrier and the resulting ability to create multiple paper prints. This permitted prints to be brought to court in essentially a facsimile capacity. For example, in an 1857 land dispute case, photographs were used to provide proof of what the land in fact looked like, and there is evidence that when the case made it to the Supreme Court, the Justices themselves examined the photos.[18] In other cases, courts allowed into evidence photographic copies of documents that were in dispute. Thus, in one case involving a dispute over the authenticity of a Mexican governor’s official seal, the Justices noted, “We have ourselves been able to compare these signatures by means of photographic copies, and fully concur [that they] are forgeries.”[19] With photography, enlarging images also became possible; courts soon began admitting photographic enlargements so jurors could scrutinize the signatories’ handwriting. For example, in *Marcy v. Barnes*,[20] the first case in which photographic evidence was the specific focus of an appeal, the issue was the admissibility of a photographic enlargement to help jurors verify a signature. Photography also became a critical tool in accident scenes.[21] Some attorneys would even submit photos of wounds to corroborate—or contradict—the claim of what caused the wound.[22] As the technology continued to advance—by the 1870s, photographers could take photographs out of doors and then develop them later in dark rooms; by the 1880s, photographers could even outsource some of the process by sending their photographic plates to the Eastman Company for developing—so did their admissibility in court. Photography was soon used to identify criminal defendants and impeach witnesses.[23] Photographic evidence was also admitted in in divorce cases as proof of a spouse’s infidelity.[24] At the same time, p. 784 ↳ photographs began playing a crucial evidentiary role outside the courtroom; as Cristina Vatulescu writes, “mug shots” were an important element of police files.[25] For example, she writes that by 1895, Parisian police had at their disposal photos of about 90,000 criminals.

Even this early photographic evidence, however, raised the issue of “truth.” Proponents of the admissibility of photograph evidence argued that the process was mechanically automatic, so there was little to no room for error and, therefore, little to no room for bias.[26] In short, photography was the equivalent of a “mirror with memory.”[27] To others, however, photography was a “dangerous perjurer.”[28] Ironically enough, it was the photography community itself, or more precisely the community of professional photographers, who were the strongest supporters of the latter view; instead of mechanical replicators, they were engaged in art making. The artists mattered.[29]

This debate over “truth” continued with the advent of moving images, though their admissibility as evidence at trial was arguably smoother, photography having paved the way. The primary hurdle to their admissibility in early cases was based on accuracy and authentication,[30] a result of the fact that early moving images tended to be reconstructions of events rather than the events themselves captured in real time. The issue of reconstructions was so predominant that the “dean of evidence,”[31] John Henry Wigmore, addressed it in his 1923 treatise. Seguing from his discussion of reconstructed still photographs, he wrote:

> The foregoing element of weakness may reach its maximum in a *moving-picture*. In so far as such a picture has any value beyond a still picture, this value depends on the correctness of the artificial reconstruction of a complex series of movements and erections, usually involving several actors, each of them the paid agent of the party and acting under his direction. Hence its reliability, as

> identical with the original scene, is decreased and may be minimized to the point of worthlessness.[32]

Significantly, Wigmore found no such risk with the prospect of real-time moving images:

> [W]here the moving-picture is taken *without artificial reconstruction*, i.e., at the time and place of the original event (a possibility not infrequent), it lacks the above element of weakness and is entitled to be admitted on the same principles as still photographs. The only circumstance then to
> p. 785 be considered is that in a few matters, ↳ such as speed and direction of human movement, or relative size in the focus, the multiple nature of the films requires special allowances of error to be made; but these are no different in kind from the elements of error inherent under certain conditions in still photographs.[33]

What was for Wigmore a "possibility not infrequent"—the availability of real-time moving images—has now become frequent indeed given the widespread use of surveillance cameras and smart devices with video recording capability, to say nothing of the move from analog to digital. The admissibility of video evidence has correspondingly become normal. Rule 1001 of Federal Rules of Evidence even includes video evidence as triggering the "Best Evidence Rule."[34] Now, the admissibility of video evidence is routine, so long as it is relevant and not unduly prejudicial, and has been authenticated through competent evidence.[35]

Video evidence has also made its impact in the law in other ways. It is now not uncommon to have legally operative video evidence of living wills and prenuptial agreements. In lawsuits over injuries, there are "day-in-the-life" videos.[36] And in criminal cases, there are surveillance videos, videotaped confessions, and videos of stopped drivers to show their state of intoxication on DUI (driving under the influence) charges. Video "photo albums" have even been admitted into evidence during part of the punishment phase of death penalty trials, showing jurors the life the victim had before death.[37] Criminal trials have even admitted computer-generated animation videos "re-enacting" theories about how the crime likely happened.[38] Videos from police officers' body-worn cameras are increasingly being admitted. And again, with the ubiquity of smartphones with their own recording capability, the use of video evidence at trial has only increased.

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43.3 Constitutional Issues

Given the ubiquity of state-owned or -operated surveillance video cameras, and the growing movement of citizens using their cameras to record the police, some discussion of constitutional issues is warranted. In brief, in the United States there are currently few constitutional restraints on the government's ability to video record individuals. On the flip side, courts have for the most part protected the rights of citizens to turn their cameras on the government, particularly on the police. The situation is different internationally. For example, Japan does not appear to regulate the use of surveillance cameras at all.[39] By contrast, in Europe, the principle of proportionality, set forth in articles 8(2) and 52(1) of the Charter of Fundamental Rights of the European Union, requires a weighing of the purpose of state surveillance against the interests of the people affected by the surveillance. A similar limitation on the interference with privacy appears in article 8 of the European Convention on Human Rights. In addition to these restraints, countries within the European Union may have their own norms and laws. Germany, for example, has section 6(b) of the Federal Data Protection Act, which is understood to regulate the monitoring of publicly accessible areas. These issues of international law, however, are beyond the scope of this chapter, as are United States non-constitutional issues, such as the existence of state statutes limiting surveillance or protecting privacy. Instead, the focus is on United States constitutional protections (section 43.3.1).

43.3.1 The Fourth Amendment and Public Surveillance Cameras

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
>
> —US Constitution, Amendment IV

The ubiquity of video cameras in public likely prompts not only an Orwellian concern—Big Brother is Watching You—but also a question: Are there any constitutional limits on the government's use of surveillance cameras in public? Could the government monitor all of our movements in public, such that the issue of privacy in public is reduced to a memory? The answer, for now, seems to be yes and yes.

p. 787 The "rule of thumb" since 1967, when the Supreme Court decided *Katz v. United States*,[40] is that the Fourth Amendment only applies to searches (or observations) when there is a reasonable expectation of privacy. As the Court put it in that case—which involved the police surreptitiously using an eavesdropping device to listen in on a private conversation—"What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[41] This "reasonable expectation of privacy test" is normative rather than descriptive. For example, the Court has applied this test to hold that the police do not require a warrant to search through a suspect's trash left outside his home for pickup.[42] According to the Court, given the trash bag's accessibility to "animals, children, scavengers, snoops, and other members of the public,"[43] the suspect could not possibly have a reasonable expectation of privacy in their contents. Invoking this test, courts have held that almost anything one knowingly exposes to a third party—bank records,[44] phone records,[45] browsing data,[46] even an oral secret[47]—are not subject to Fourth Amendment protection.

Turning to surveillance cameras in public places, although the Court has not specifically ruled on the constitutionality of such surveillance, their rulings in other cases have led scholars to treat the issue as a foregone conclusion.[48] Specifically, in a series of cases in which the government used a tracking device to track a suspect in public, the Court ruled that public surveillance does not violate the Fourth Amendment. Two cases of note are *United States v. Knotts*[49] and *United States v. Karo*.[50] In *Knotts*, the government used a device to track a container and the device ultimately led them to Knotts. Rejecting Knotts's claim that this amounted to a Fourth Amendment violation, the Court stressed that since the package traveled along public roads subject to visual surveillance from public places, the information was "voluntarily conveyed to anyone who wanted to look"[51] and thus there could be no reasonable expectation of privacy to trigger
p. 788 Fourth Amendment protection. The Court reached a similar conclusion in *Karo*, adding only ↳ the caveat that tracking *does* implicate the Fourth Amendment when it ceases to be public trafficking and crosses the threshold into the home.[52]

Recently, there was some hope that the Court would rethink its reasonable expectation of privacy jurisprudence given advances in technology, but to date that hope has yet to be realized. In *United States v. Jones*,[53] the government attached a GPS tracking device to a suspect's vehicle and used it to monitor his public movements for some thirty days. The Court's precedents in *Knotts* and *Karo* would have dictated that this long-term monitoring was not regulated by the Fourth Amendment, since precedent had established that there is no reasonable expectation in what can be readily observed in public.[54] However, rather than revisit the test in light of technological advances, Justice Scalia, writing for a five-member majority, instead revived a separate, independent test to govern Fourth Amendment searches. The Fourth Amendment could also be triggered by a trespass. The Court used this trespass test to find a Fourth Amendment violation when the police surreptitiously attached the GPS transmitter to the underside of Jones's car.[55]

Interestingly, since trespass will almost never be an issue in cases involving public surveillance, public surveillance video will continue to exist outside Fourth Amendment regulation for the foreseeable future. The Supreme Court confirmed this view in dicta in the more recent case of *Carpenter v. United States*.[56] Although the case involved cell-site location data, the Court expressly noted that it was not calling into question non-targeted public surveillance techniques, such as surveillance cameras.[57]

None of this is to suggest that government's use of video surveillance, and the lack of constitutional protection from such surveillance, has gone unquestioned. For example, Professor Christopher Slobogin calls the government's use of technology as a surveillance tool as an "insidious assault on our freedom."[58] Professor Neil Richards complains of "surveillance societies."[59] The point here is that it is not just technology qua technology that is leading to widespread video surveillance. It is also the US Supreme Court's interpretation of the Fourth Amendment, which permits such surveillance and deems it outside the Fourth Amendment's prohibition against "unreasonable searches and seizures."

43.3.2 The First Amendment and Sousveillance

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.
>
> —US Constitution, Amendment I

p. 789 The ubiquity of private video cameras, mostly via smartphone technology, raises a separate issue: are there constitutional limitations on the private use of video cameras? Although this is certainly not the only question or legal issue—the use of such recordings in "revenge porn"[60] comes immediately to mind, as does the use of private video cameras to monitor employees and caretakers ("nanny cams"[61] may already be familiar to most readers; a few states even loan video cameras to citizens to secretly monitor and record caretakers[62])—the focus here is on "sousveillance," the term Steve Mann uses for turning the cameras on the state to watch the watchers. As Professor Jocelyn Simonson adds, sousveillance "serves as a counter to the disciplining effects of surveillance; it is a technique for pushing back against the monopoly of those in power over information, technology, and control. … With sousveillence, observation becomes a form of resistance."[63] Indeed, it is because of this *counter*power that sousveillance has become one of the most contested issues not just in the United States, but internationally as well.[64]

The widespread availability of smartphones with recording capability has increased interest in sousveillance, including in attempts to regulate sousveillance. However, as an initial matter, it is important to note that prior to smartphones, videos recorded on camcorders were beginning to function as a form of contestation, "making real" issues that previously had been more easily dismissed. Most famously, in 1991, an individual used his camcorder to capture several Los Angeles police officers beating Rodney King with billy clubs, kicking him, and stunning him with a Taser "stun gun." The video evidence, which served as a catalyst for the Los Angeles Riots of 1991, arguably made real a problem of police brutality which racial minorities had long known to exist, but which the majority of Americans had been able to ignore.

Today, the ready availability of smartphones has resulted in a plethora of sousveillance video recordings of police officers. In the last few years alone, these sousveillance recordings include those of Officer Daniel Pantaleo placing Eric Gardner in a fatal chokehold on July 17, 2014; the shooting death of Walter Scott, who was shot in the back by police officer Michael Slager on April 4, 2015; the shooting death of Philando Castile,
p. 790 who was shot by an officer during the course of a "routine" traffic stop on July 6, 2016, while Castile ↳ was reaching in his glove compartment for the license and registration the officer had asked for; and the body slamming of Dajerria Becton, a teenage girl who was body slammed to the ground by a Texas police officer.

Indeed, the news stories, made newsworthy by the presence of video, appear so frequently that *The Huffington Post* for a time devoted an entire section to police brutality.[65] It has also catapulted the Black Lives Matter Movement into the national conversation, propelled many communities to engage in organized "copwatching," and of course prompted countless individuals to record their encounters with the police. For minorities and other outsiders in particular, such sousveillance often functions as a type of truth, "as a way of making racism and inequality real."[66] Such evidence has particular importance given the history of not crediting racial minorities.[67] Indeed, the ability of video evidence to counter dominant narratives, including police narratives, has prompted critical race theorist Lolita Buckner Innis to describe video cameras as equivalent to a "white witness."[68]

As such, the right of individuals to turn the cameras on the state is a matter of significant consequence. It is also a matter that, despite a growing body of case law recognizing a First Amendment right to record police activity in public, remains very much contested. Every federal appellate court to address the issue (to date, the First, Third, Fifth, Seventh, Ninth, and Eleventh Circuits) has now held that there is a First Amendment right to record police activity in public.[69] As the Third Circuit recently observed, "Simply put, the First Amendment protects the act of photographing, filming, or otherwise recording police officers conducting their official duties in public."[70] It also "protects the public's right of access to information of their officials' public activities."[71] That said, these same courts recognize that the right to record the police is not absolute; there may be reasonable "time, place, and manner" restrictions, such as restricting filming that physically interferes with police activities.

p. 791 In theory, these restrictions on the First Amendment right to record the police should rarely apply when filming is done from a distance or does not otherwise impede the police in their official duties. "However, in practice, officers do not always recognize this distinction."[72] Professor Simonson observes that, notwithstanding First Amendment protections, police officers still:

> Arrest copwatchers for charges that can include failure to obey an officer, interference with police conduct, harassment, and disorderly conduct. Some recorders report that their images or videos have been erased after being seized by police officers. Officers have also arrested bystanders for failing to turn over cameras and images of police conduct.[73]

Officers also deter sousveillance by engaging in behavior that falls short of arrests, such as hassling those engaged in sousveillance and threatening to arrest them. Unfortunately, these actions tend to remain beyond judicial oversight. All of this suggests that sousveillance remains a fraught issue, and one deserving of increased protection.

That being said, sousveillance remains important. It not only shifts the balance of power between citizens and the state. Such sousveillance also has the potential to educate the public and officials, including judges, by countering myopic perspectives that favor the police. As Professor Simonson has written, such sousveillance can even "help change constitutional meaning."[74] Put differently, sousveillance can change the state.

43.4 *Scott v. Harris*

Perhaps the most famous case to come before the Supreme Court involving video evidence is *Scott v. Harris*,[75] a case involving a civil rights action brought by a motorist against a sheriff's deputy. The facts were simple enough. As the Court recounted in its opinion:

> In March 2001, a Georgia county deputy clocked respondent's vehicle traveling at 73 miles per hour on a road with a 55-mile-per-hour speed limit. The deputy activated his blue flashing lights

> indicating that respondent should pull over. Instead, respondent sped away, initiating a chase down what is in most portions a two-lane road, at speeds exceeding 85 miles per hour. …
>
> [Sheriff’s Deputy Timothy Scott] took over as the lead pursuit vehicle. Six minutes and nearly 10
> miles after the chase had begun, Scott decided to attempt to terminate the episode …. Scott applied
> p. 792 his push bumper to the rear of respondent’s vehicle. ↳ As a result, respondent lost control of his
> vehicle, which left the roadway, ran down an embankment, overturned, and crashed. Respondent
> was badly injured and was rendered a quadriplegic.[76]

What is remarkable about *Scott v. Harris*, however, is not so much the facts as how the Court treated the video evidence in the case. In a very real sense, the Court’s viewing of the videotape and the weight the Court gave it was as radical as when Justices of the Supreme Court first examined photographs in the 1859 case *Luco v. United States*.[77] When the respondent Victor Harris sued the deputy for using excessive and unnecessary force in violation of his Fourth Amendment right to be free from unreasonable seizures, the Court essentially discarded procedural rules that had previously required courts, in qualified immunity cases, to adopt the plaintiff’s version of the facts.[78] For the Court, such procedural niceties seemed antiquated and improper in the face of video evidence taken from the deputy’s dashboard video camera. The Court noted:

> The videotape quite clearly contradicts the version of the story told by the respondent and adopted by the [lower court]. For example, the Court of Appeals adopted the respondent’s assertions that, during the chase, “there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and [respondent] remained in control of his vehicle.” …
>
> The video tells quite a different story …. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing officers and innocent bystanders alike at great risk of serious injury.[79]

The Court held that, notwithstanding the general requirement that courts adopt the plaintiff’s version of facts, the lower court here should not have relied on the plaintiff’s assertions, which amounted to “fiction.”[80] Instead, the lower court “should have viewed the facts in the light depicted by the videotape.”[81] As if recognizing that the video might be more persuasive than its written opinion and ruling, the Court even uploaded the video to the Court’s website and invited the public to see the video for themselves.[82] In short, for the Court, the video evidence *was* text. It was *res ipsa loquitur*,[83] was itself both proof and truth, and dictated a ruling in favor of the deputy. Or as the law and humanities scholar Peter Brooks puts it, “[T]he video itself becomes the central actor, its performance of the truth trumps all the usual judicial rules, turns the Supreme Court justices into ‘jurors,’ † and makes viewing of an unfolding action the sole factor of judgment.”[84]

p. 793 There are at least two reasons to include *Scott v. Harris* in any discussion of video evidence. The first reason is that makes real, with real consequences, the general association of video evidence with truth, within both courts of justice and courts of public opinion. This association, to be sure, is not entirely new. It is traceable to video’s precursor, the still photograph. In the words of Oliver Wendell Holmes, a photograph was equivalent to a “mirror with a memory,” reflecting the truth. Susan Sontag, in her seminal book *On Photography*, also notes this assumption: “Photography furnishes evidences. Something we hear about, but doubt, seems proven when we’re shown a photograph of it.”[85] Photographic images, whether still or moving, also “legitimize and concretize in a way language does not.”[86] Here, the observation of Roland Barthes bears repeating. One who views a photograph knows that “someone has seen the referent … in flesh and blood, or again, in person …. from a real body, which was there, proceed radiations which ultimately touch me, who am here.”[87] Indeed, images “tap into something that is often stronger evidence than language.”[88] It is for this very reason that video evidence has become so important, and consequential, as evidence, from its use as "day-in-the-life" evidence in tort and wrongful injury claims to its use as moving photo albums and statements from the grave in capital cases.

There is something else to note about the association of video evidence with truth. This association with truth is so visceral that it already has changed constitutional meaning. This is especially true in the fetal imagery context. As scholars such as Carol Sanger and Jessica Silbey have observed, fetal ultrasound videos have played an outsized role in galvanizing the right-to-life movement, in prompting a rash of Women's Right to Know Acts that require women to be shown their ultrasounds before deciding to abort, and in shifting how courts understand a woman's constitutional "right to choose" in such cases as *Dillon v. Legg*.[89]

The second reason to include *Scott v. Harris* in any discussion of video evidence, or video as text, is that *Scott v. Harris* also reveals the limits of video evidence and indeed, its very deceptiveness. It surfaces what Andre Bazin calls the "myth of total cinema," or the assumption that film reproduces reality "unburdened by the freedom of interpretation of the artists or the irreversibility of time."[90] After all, although the majority in p. 794 *Scott* claimed to see the same thing—the respondent Victor Harris driving in a way that "created ↳ a tremendous risk [to] drivers on that road," to quote Justice Alito[91]; "the scariest chase I ever saw since 'The French Connection,' " to quote Justice Scalia[92]—what the dissent saw was exactly the opposite. Per Justice Stevens, "[T]he tape actually confirms, rather than contradicts, the lower courts' appraisal of the factual questions at issue."

To borrow from Professor Dan Kahan, "Justice Stevens was plainly advancing the claim that the tape *doesn't* speak for itself."[93] Or to borrow from Professor Brooks, the tape itself was a "visible fiction."[94] Nor is Justice Stevens alone. As Professor Kahan noted in his empirical study published in the *Harvard Law Review*, many individuals who watched the same tape, especially African Americans, low-income workers, and liberals, "tended to perceive less danger in Harris's flight, to attribute more responsibility to the police for creating the risk for the public, and to find less justification in the use of deadly force to end the chase."[95] Kahan adds, "[T]hese individuals were much more likely to see the police, rather than Harris, as the source of the danger posed by the flight and to find the deliberate ramming of Harris's vehicle unnecessary to avert risk to the public."[96] In short, what one sees may be informed by one's experience and world view.

Scholars have commented on the deceptiveness of photographic imagery more generally. As Andrea Roth recently observed:

> The camera is a relatively simple machine, in terms of its physical form and internal processes. But because photography is highly sensitive to human input and human bias, photographic evidence can easily mislead a factfinder. A cameraperson might intentionally or through unconscious bias choose a lens, filter, or angle to make a suspect look more sinister or guilty, make a wound seem deeper or shallower, or make a distance seem greater or smaller. Moreover, photographs and film do not provide factfinders with full context. Key aspects of an event or condition might be missed or obscured because of poor sound or visual quality of an image or film, potentially leading a factfinder to draw improper inferences. For day-in-the-life videos and other filmic evidence created expressly for litigation, the motivation for biased representation of facts—such as increasing film speed to make a disabled person look less injured—might be particularly high. Photographs can also be modified or fabricated, just like any other physical object. After capturing an image, a photographer may choose to "reverse the negative" so that the right side of the photograph appears on the left side.[97]

p. 795 Although most of Roth's focus is on photography, the same is equally true of video evidence, as any viewer of contemporary film can attest. Although video evidence may be thought of as "*evidence vérité*," to borrow from Jessica Silbey,[98] its "truth" can actually be deception. Indeed, Silbey goes a step further, noting:

> [F]ilm is a constructed medium. The camera always presents a certain point of view and a frame that includes some images and excludes others. Films are depicted in artificial light and color. From the earliest emergence of film technology, filmmakers and critics recognized that the appearance of reality in film is an illusion based on conventions of representation. … These conventions produce images that resemble and represent reality, but are not reality in fact.[99]

All of this raises several questions. Why do litigators and courts assume the truth of video evidence?[100] Equally important, why do courts and litigants treat video evidence as objective rather than recognizing that even surveillance video evidence, like photographic evidence, has a point of view? (It speaks volumes that Professor Seth Stoughton demonstrated the importance of camera point of view in the context of police video for the *New York Times.*[101] It speaks volumes that we, as a society, as readers, and as fact-finders, needed to be reminded of this.) Is it possible that courts and litigants implicitly recognize the lack of pure objectivity with video evidence but recognize that it is at least as objective as an eyewitness? But even if this is true, it seems that there are areas for improvement; areas where law can learn from photography and film.

Consider just two examples. Example One: In a criminal trial, the prosecution plays a video of a police interrogation during which the suspect, an eighteen-year-old with cognitive impairment, confesses to a crime. The evidence from the video camera, mounted on a wall, may seem objective and may accurately depict the suspect's demeanor and confession. But if the video focuses only on the defendant and fails to capture the interrogators, it may lure fact-finders into assuming that the confession was entirely voluntary and not suggestive. Absent from the footage might be evidence of the police interrogators' demeanor, such as them shaking their heads at certain answers or nodding encouragement in response to other answers.[102]

Example Two: In a criminal trial, the prosecution plays a video of a police interrogation during which the suspect, an eighteen-year-old with cognitive impairment, confesses to a crime. Unnoticed by the fact-finders, and perhaps even unnoticed by the judge or litigants, is that because of the exposure or contrast, the defendant's skin appears darker in the video than it is in reality. This darkening of the skin may seem insignificant but in fact may have outsized significance when one considers studies showing that individuals associate darkness with criminality,[103] so much so that in death penalty cases, darkness is associated with deathworthiness.[104] All this further complicates the "association between bodily self-evidence and legal knowledge of intention" that Subha Mukherji writes about.[105]

Aside from these problems, there is yet another: if video evidence "tends to overwhelm all other evidence, such as witness testimony, paper records, and other documentary evidence,"[106] what does it mean for justice when the image before the jurors takes precedence over the very real defendant in the room, when the image becomes more real than the defendant?

43.5 Conclusion

This chapter has touched on just a few of the issues involving the intersection of video and law, addressing the history of the use of video evidence in court, as well as constitutional limitations on the power to engage in video surveillance, and finally discussing the recent case *Scott v. Harris* and what it says, and does not say, about truth. The hope is that chapter will prompt further inquiry. The hope too is that more scholars will begin to think seriously about video evidence, to interrogate it, and even "cross-examine" it.[107]

Further Reading

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Notes

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19 Luco v. United States, 64 U.S. (22 How.) 515, 541 (1859).

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26 Mnookin, “Image of Truth,” 19.

27 Ibid., 17.

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30 For a discussion of early cases, see Carl. M. Gray, “Motion Pictures in Evidence,” *Indiana Law Journal* 15 (1940): 408–436.

31 Franklin Strier, “Making Jury Trials More Truthful,” *UC Davis Law Review* 30 (1996): 95–182, 112 n. 54. See also John H. Langbein, “The Historical Foundations of the Law of Evidence: A View from the Ryder Sources,” *Columbia Law Review* 95 (1996): 1168–1202, 1170 (describing Wigmore as our “pioneering scholar of the history of the law of evidence”).

32 *Wigmore on Evidence* § 798 (2d ed. 1923) (emphasis in original).

33 Ibid. (emphasis in original).

34 See Fed. R. Evid. 1001 and accompanying notes.

35 Indeed, courts have held that it is reversible error to bar the use of such evidence. See Fred I. Heller, “Using or Challenging a ‘Day-in-the-Life’ Documentary in a Personal Injury Lawsuit,” *American Jurisprudence Trials* 40 (1990): 249 § 9.

36 *See* Fred I. Heller, “Planning and Producing a ‘Day-in-the-Life’ Videotape in a Personal Injury Lawsuit,” *American Jurisprudence Trials* 39 (1989): 261; Fred I. Heller, “Using or Challenging a ‘Day-in-the-Life’ Documentary in a Personal Injury Lawsuit,” *American Jurisprudence Trials* 40 (1990): 249; Fred I. Heller, “Videotaped Settlement Brochure,” *American Jurisprudence Trials* 434 (1991): 239.

37 *See, e.g.,* State v. Gray, 887 S.W.2d 369, 289 (Mo. 1994) (allowing the prosecutor to show “a video of the [victim’s] family Christmas”); Whittlesey v. State, 665 A.2d 223, 230 (Md. 1995) (admitting videotape of the victim playing the piano); United States v. Wilson, 493 F. Supp. 2d 491, 505 (E.D.N.Y. 2007) (permitting prosecution to play, during penalty phase, a twenty-minute video of the victim-police officer, who had been interviewed by a television news program); People v. Zamudio, 181 P.3d 105, 118 (Cal. 2008) (allowing fourteen-minute video chronicling the victim’s life); People v. Kelly, 171 P.3d 548 (Cal. 2007) (allowing video montage of victim’s life, set to the music of Enya).

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44 United States v. Miller, 425 U.S. 164 (1974).

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49 460 U.S. 276 (1983).

50 468 U.S. 705 (1984).

51 *Id*. at 282.

52 *Id.* at 716.

53 132 S. Ct. 945 (2012).

54 Indeed, the Court had earlier stated that a "person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." United States v. Knotts, 460 U.S. 276, 281 (1983).

55 *Jones*, 132 S. Ct. at 950–953.

56 136 U.S. 2206 (2018).

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58 Christopher Slobogin, *Privacy at Risk: The New Government Surveillance and the Fourth Amendment* (Chicago: University of Chicago Press, 2007), ix.

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61 See, e.g., Jessica Sann, "Nanny-Cams and Our Privacy," *UCLA Journal of Law and Technology Notes* 2002: 20.

62 See, e.g., "States Loan Out Secret Cameras Amid Concerns About Elder Abuse," *NBCNews.com*, June 3, 2018. New Jersey, for example, has a "Safe Care Cam" program to "make cameras and memory cards available on loan for free to New Jersey residents who suspect their loved ones are being mistreated or neglected by an in-home caregiver." See Press Release, "New Jersey Attorney General and Division of Consumer Affairs Announce Plans to Expand "Safe Care Cam" Program, Tighten Home Health Aides Rules to Enhance Protection of Elderly and Disabled," *NJ.gov*, May 9, 2017.

63 Simonson, "Copwatching," 415.

64 The focus here, however, is on sousveillance in the United States, though sousveillance of course exists outside the United States. For example, it is said that in Russia, given the corruption of traffic officers, "dash-mounted cameras are a virtual necessity for motorists." Jerry Brito, "Sousveillance Turns the Tables on the Surveillance State," *Reason.com*, Nov. 28, 2013. Sousveillance also played a role in the Arab Spring.

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68 As Lolita Buckner Inniss observes:

> [V]ideo surveillance sometimes provides much needed valorization for … less regarded private people [those possessing little power or authority.] This is because private people are far more often lied about, lied to and deemed liars. Hence

private people often lose in battles of opposing narratives with public people about what has occurred. In such cases, video surveillance becomes a mostly neutral, unlikely to lie, legitimizing witness. For many of these private people, especially women, people of color or other relatively powerless people in society, video surveillance is the modern day white witness.

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69 *See* Fields v. City of Philadelphia, 862 F.3d 353 (3d Cir. 2017); Turner v. Lieutenant Driver, 848 F.3d 678 (5th Cir. 2017); Gericke v. Begin, 753 F.3d 1 (1st Cir. 2014); Am. Civil Liberties Union of Ill. v. Alvarez, 679 F.3d 583 (7th Cir. 2012); Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011); Smith v. City of Cumming, 212 F.3d 1332 (11th Cir. 2000); Fordyce v. City of Seattle, 55 F.3d 436 (9th Cir. 1995).

70 Fields v. City of Philadelphia, 862 F.3d 353 (3d Cir. 2017).

71 *Id.*

72 Simonson, "Copwatching."

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74 Ibid., 425.

75 127 S. Ct. 1769 (2007). Indeed, the opinion has been described as the Court's first "multimedia cyber-opinion." See Dan M. Kahan, David A. Hoffman, and Donald Braman, "Whose Eyes Are You Going to Believe? *Scott v. Harris* and the Perils of Cognitive Illiberalism," *Harvard Law Review* 122, no. 3 (2009): 837–906, 840.

76 *Scott*, 127 S. Ct. at 1772–1773.

77 64 U.S. (22 How.) 515, 541 (1859).

78 *Scott*, 127 S. Ct. at 1775.

79 *Id.* at 1775–1776.

80 *Id.* at 1776.

81 *Id.*

82 *Id.* at 1775 n. 5 and www.supremecourtus.gov/opinions/video/scott_v_harris.html.

83 As the Court itself put it, "We are happy to allow the videotape to speak for itself." 127 S. Ct. at 1775 n. 5.

84 Peter Brooks, "*Scott v. Harris*: The Supreme Court's Reality Effect," *Law & Literature* 29 (2017): 143–149, 145.

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86 Bennett Capers, "On Andy Warhol's Electric Chair," *California Law Review* 94, no. 1 (2006): 243–260, 245.

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88 Capers, "On Andy Warhol's Electric Chair," 245; cf. Richard D. Leppert, *Art and the Committed Eye: The Cultural Functions of Imagery* (New York: Basic Books, 1996), 6 (noting that "images are less visual translations of what might otherwise be said (in words) than they are visual transformations of a certain awareness of the world.").

89 68 Cal. 2d 728, 740 (1968); see also Carol Sanger, *About Abortion: Terminating Pregnancy in Twenty-First Century America* (Cambridge, MA: Harvard University Press, 2017), 19–23, 107–127; Silbey, "Images in/of Law," 176.

90 Andre Bazin, *What Is Cinema?* (Berkeley: University of California Press, 2005), 17.

91 Transcript of Oral Argument at 27, Scott, 127 S. Ct. 1769 (No. 05-1631).

92 *Id.* at 28.

93 Kahan et al., "Whose Eyes," 848 (emphasis added).

94 Brooks, "*Scott v. Harris*," 145.

95 Kahan et al., "Whose Eyes," 841. Kahan conducted the study using approximately 1350 individuals drawn from a demographically diverse panel. As part of the study, the participants reviewed a video composite of two videos from the actual *Scott v. Harris* case. The participants were then asked a series of questions to gauge their views on, among other things, the danger Harris's driving posed to the public and the relative culpability of Harris and the police for any such danger. For a lengthier discussion of the study's design and methodology, see ibid., 854–874.

96 Ibid., 841.

97 Andrea Roth, "Machine Testimony," *Yale Law Journal* 126 (2017): 1972–2053, 2007–2008.

98 Jessica Silbey, "*Evidence Verité* and the Law of Film," *Cardozo Law Review* 31 (2010): 1257–1299.

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100 Silbey, "*Evidence Verité*," 1257–1258 (observing that video evidence "is rarely analyzed for its ambiguity, its bias, or its incompleteness.").

101 Timothy Williams et al., "Police Body Cameras: What Do You See?," *New York Times*, Apr. 1, 2016, https://www.nytimes.com/interactive/2016/04/01/us/police-bodycam-video.html

102 Studies of videotaped confessions confirm the distorting role perspective plays. See Mary D. Fan, "Justice Visualized: Courts and the Body Camera Revolution," *UC Davis Law Review* 50 (2017): 897–957; see also G. Daniel Lassiter et al.,

"Attributional Complexity and the Camera Perspective Bias in Videotaped Confessions," *Basic & Applied Psychology* 27 (2005): 27–35, 28–30.

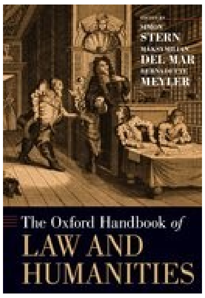
103 See Jennifer L. Eberhardt et al., "Seeing Black: Race, Crime, and Visual Processing," *Journal of Personality & Social Psychology* 87, no. 6 (2004): 876–893.

104 Jennifer Eberhardt et al., "Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes," *Psychological Science* 17, no. 5 (2006): 383–386, 383.

105 See Subha Mukherji's chapter, "Facing Justice: Evidence, Legibility, and Pensiveness in Early Modern Imagination," in this volume.

106 Jessica Silbey, "*Evidence Verité* and the Law of Film," 1257.

107 Jessica Silbey, "Cross-Examining Film."



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CHAPTER

44 Police Records: An Intermedia Genre

Cristina Vatulescu

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Abstract

This chapter approaches police records as a genre that gains from being considered in its relationships with other genres of writing. In particular, we will follow its long-standing relationship to detective fiction, the novel, and biography. Going further, the chapter emphasizes the intermedia character of police records not just in our time but also throughout their existence, indeed from their very origins. This approach opens to a more inclusive media history of police files. We will start with an analysis of the seminal late nineteenth-century French manuals prescribing the writing of a police file, the famous Bertillon-method manuals. We will then track their influence following their adoption nationally and internationally, with particular attention to the politics of their adoption in the colonies. We will also touch briefly on the relationship of early policing to other disciplines, such as anthropology and statistics, before moving to a closer look at its intersections with photography and literature.

Keywords: police records: history of, genre of writing, visual and intermedia aspects of, adoption in the colonies, identification, criminal identity, Alphonse Bertillon

Subject: Jurisprudence and Philosophy of Law, Law and Society, Law

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THE subtitle of this chapter may surprise readers: why intermedia? “Intermedia” is a term first introduced in the art world in 1965 by Dick Higgins, to praise the kind of art that takes place not just within one medium but between mediums, such as Marcel Duchamp’s experiments.[1] In the meantime, intermedia has stretched to include art and other practices that happen between different mediums, technologies, and, crucially for our purposes, disciplines. Intermedia is thus broader than mixed media, which is usually restricted to visual arts. Whereas multimedia is generally tied to the computer platform, intermedia is more wide-ranging. It is critical to me that intermedia emphasizes the *inter*action between the mediums, technologies, and disciplines at play, not just their juxtaposition or concatenation. My argument in this chapter is that the modern police file emerged in the late nineteenth century as a genre that was defined by the tightly controlled interaction among words, photographic images, and numbers. The interaction could not be more intense, as each of these mediums had failed on its own to respond to the police file's new challenge: the identification of repeat criminals.[2] A testimony to this interaction is not just the patently intermedia police file but also its baffling intermedia components, such as the *spoken portrait* and the standardly *marked-up* mugshot. These word-and-image conglomerates were matched by a whole apparatus of reading human beings and archiving that translated images into words and numbers.

The birth of the modern police file, as standardized in the Bertillon manuals studied in section 44.1, is a key episode in the history of how mediums came to interact and to be yoked together in the representation of the human in modernity. Indeed, the Bertillon police files came closest to the definition of "intermedium" p. 800 given in the first ↳ coinage of the word, in 1812, by Samuel Taylor Coleridge.[3] These police files were indeed "an intermedium between person and personification," that is to say a particular type of representation of a human being.[4] In Coleridge's case, this was "a narrative allegory."[5] In Bertillon's, this intermedium was the police file—the new type of representation that was mandated to double up as identification. These intermedia relations and technologies of the early police file have strong contemporary consequences, whether we recognize their echoes or not. As Mark Maguire has shown, "beyond the apparent newness of [contemporary biometric security], key biometric technologies owe their origins to 19th-century deployments and then as now they may be understood as a form of bio-governmentality in which the security of identity opens possibilities for population control."[6]

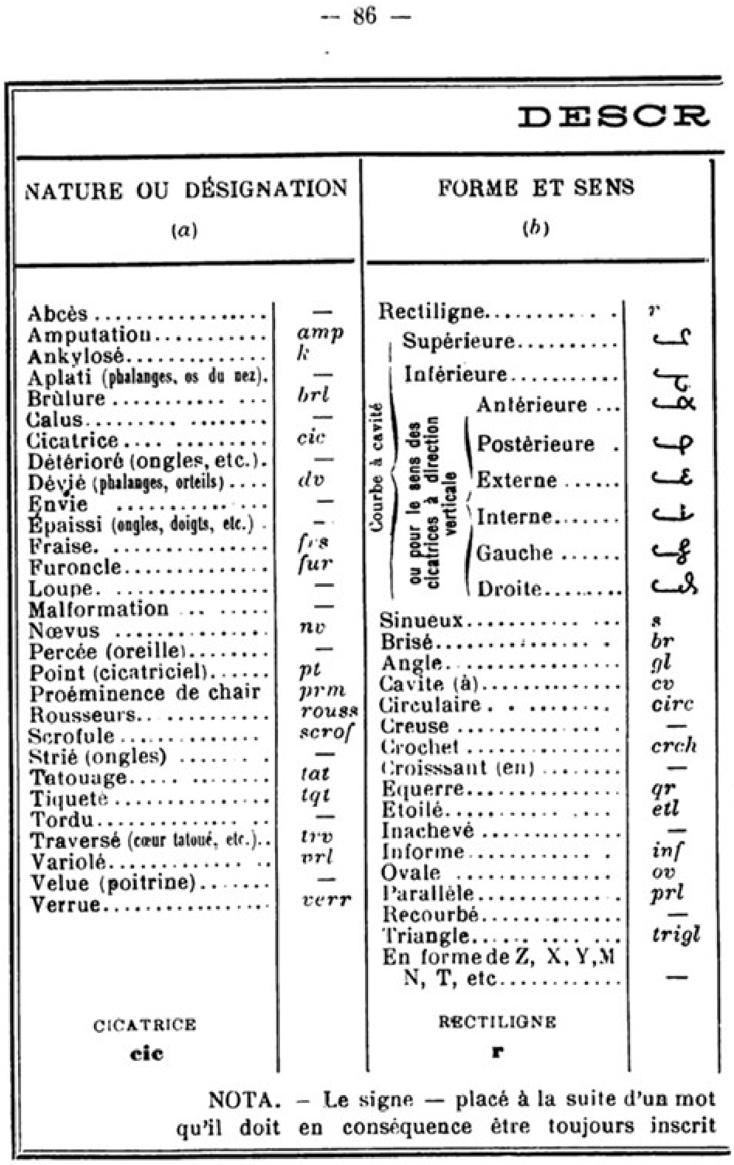
44.1 The Birth of the Modern Police Record: Bertillon-Method Manuals

Walter Benjamin wrote that the challenge of identifying a criminal shielded by the anonymity of the modern masses "is at the origin of the detective story."[7] Unprecedented mobility and the resulting elusiveness of criminal identities in the modern metropolis were also at the origin of modern criminology, a discipline that developed in the late nineteenth century around identification.[8] In the 1870s, pioneering criminologist Alphonse Bertillon proposed a method for identifying criminals that synthesized many of criminology's early advances, prejudices, and fantasies. His police records combined mugshots, anthropometric measurements of the body, the verbal portrait (*portrait parlé*), and the record of peculiar characteristics (such as tattoos and accents). By the end of the nineteenth century, the skeleton of the modern police file was already well in place in most of Europe. It quickly spread in the French colonies, and then elsewhere in p. 801 the world, particularly in Latin America.[9] Introducing his methods in prolific manuals ↳ bursting at the seams with detailed charts and illustrations, Bertillon did not tire of emphasizing that, despite the bewildering variety of means he espoused, "The goal is always identification."[10] J. Gabriel Ducry, a contemporary disciple of Bertillon's, summarizes the aim of his own Bertillon-method manual as "finding and identifying the targeted person in a crowd."[11]

While Bertillon was central to the development of criminology, he was certainly not unique. Indeed, he worked within a milieu where science and at times pseudo-science were developing at rapid pace, cross-fertilizing with other upstarts searching for scientific credibility, notably statistics, sociology, anthropology, and psychoanalysis.[12] Bertillon's family was representative for the times—his father was a founding member of the Society for Statistics and an anthropometrist, while his brother was a statistician and demographer. (His mother, in a manner also representative for those times, and maybe for ours, is not mentioned in these biographies.)[13] Other notable criminologists and scientists who influenced him and/or were influenced by him were Cesare Lombroso, Adolphe Quetelet, Francis Galton, and Hans Gross. What makes Bertillon, however, the central figure in our story is his lifelong preoccupation with police records. Bertillon started his work in the police force as a clerk and copyist and climbed up to be Chief of Criminal Identification for the Paris Police.[14] His contributions on anthropometric measurements, early work on fingerprints, mugshots, and the development of a whole language for the spoken portrait all assure him a central place in the scientific study of criminology. But as Max H. Houch reminds us, “The central instrument of the [Bertillonage] system was not the camera but the filing cabinet.”[15] This is a point worth remembering because in the face of the cornucopia of arresting photographs left over from Bertillonage, one can easily forget the less visible technologies of archiving that tied all these different mediums and inventions together, and that were the backbone of ↳ the system. Bertillon was indeed singularly influential in shaping modern police archives and their records—thus his central place in our story.

This new methodology of the police record is amply documented in the unprecedented flourishing of a peculiar genre, the Bertillon-method manual. Pioneered by Bertillon himself, these manuals were also authored by the many disciples who made the pilgrimage to Bertillon’s quarters not just from all of France but also from its colonies and from other countries and continents, to be trained in his methods.[16] The manuals impressed and overwhelmed many a novice with the interminable list of details they mandated necessary for inclusion in the police record, the prescriptive precision of the vocabulary used, the long lists of abbreviations to be memorized that themselves take pages on end.[17] In one of the most thorough examples of the genre, Ducry’s *Manual-Vocabulary of the Spoken Portrait (Alphonse Bertillon Method)*, a Marseille chief of police shares the lessons learned during a training session in Paris with Bertillon himself.[18] Each description of a facial feature takes at least a page filled with adjectives and then another page of rich illustrations. Some features, like the eyes, need more detail—four pages in minuscule print are dedicated to the adjectives recommended for the description of the “left iris.”[19] It can be “pale, yellow, orange, chestnut, or brown.” Just the “pale,” like each of the other colors, can itself be of different nuances: “cerulean, intermediary-violet, slate, (with or without pallor).”[20] Then consider the aureole, which could be “laced, concentric, ray-like,” and itself of various nuances.[21] After this treatise on all the nuances, shapes, and crenellations of the left iris, each other part of the eyes—eyebrows, eyelids, eyeballs, and orbits—receives two pages of text and a page of illustrations.[22] This is overflowing yet tightly controlled, precise verbiage (Figure 44.1). Their obsessive preoccupation with language both defines these manuals and threatens their undoing into lists of more and more particular adjectives.

Figure 44.1



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DESCR

NATURE OU DÉSIGNATION (a)			FORME ET SENS (b)	
Abcès	—		Rectiligne	r
Amputation	amp	Courbe à cavité	Supérieure	
Ankylosé	k		Inférieure	
Aplati (phalanges, os du nez).	—		Antérieure	
Brûlure	brl	ou pour le sens des cicatrices à direction verticale	Postérieure	
Calus	—		Externe	
Cicatrice	cic		Interne	
Détérioré (ongles, etc.).	—		Gauche	
Dévié (phalanges, orteils)	dv		Droite	
Envie	—		Sinueux	s
Épaissi (ongles, doigts, etc.)	—		Brisé	br
Fraise.	frs		Angle	gl
Furoncle	fur		Cavite (à)	cv
Loupe.	—		Circulaire	circ
Malformation	—		Creuse	—
Nœvus	nv		Crochet	crch
Percée (oreille)	—		Croisssant (en)	—
Point (cicatriciel)	pt		Equerre	qr
Proéminence de chair	prm		Etoilé	etl
Rousseurs	rouss		Inachevé	—
Scrofule	scrof		Informe	inf
Strié (ongles)	—		Ovale	ov
Tatouage	tat		Parallèle	prl
Tiqueté	tqt		Recourbé	—
Tordu	—		Triangle	trigl
Traversé (cœur tatoué, etc.)	trv		En forme de Z, X, Y, M N, T, etc	—
Variolé	vrl			
Velue (poitrine)	—			
Verrue	verr			
CICATRICE **cic**			RECTILIGNE **r**	

NOTA. — Le signe — placé à la suite d'un mot
qu'il doit en conséquence être toujours inscrit

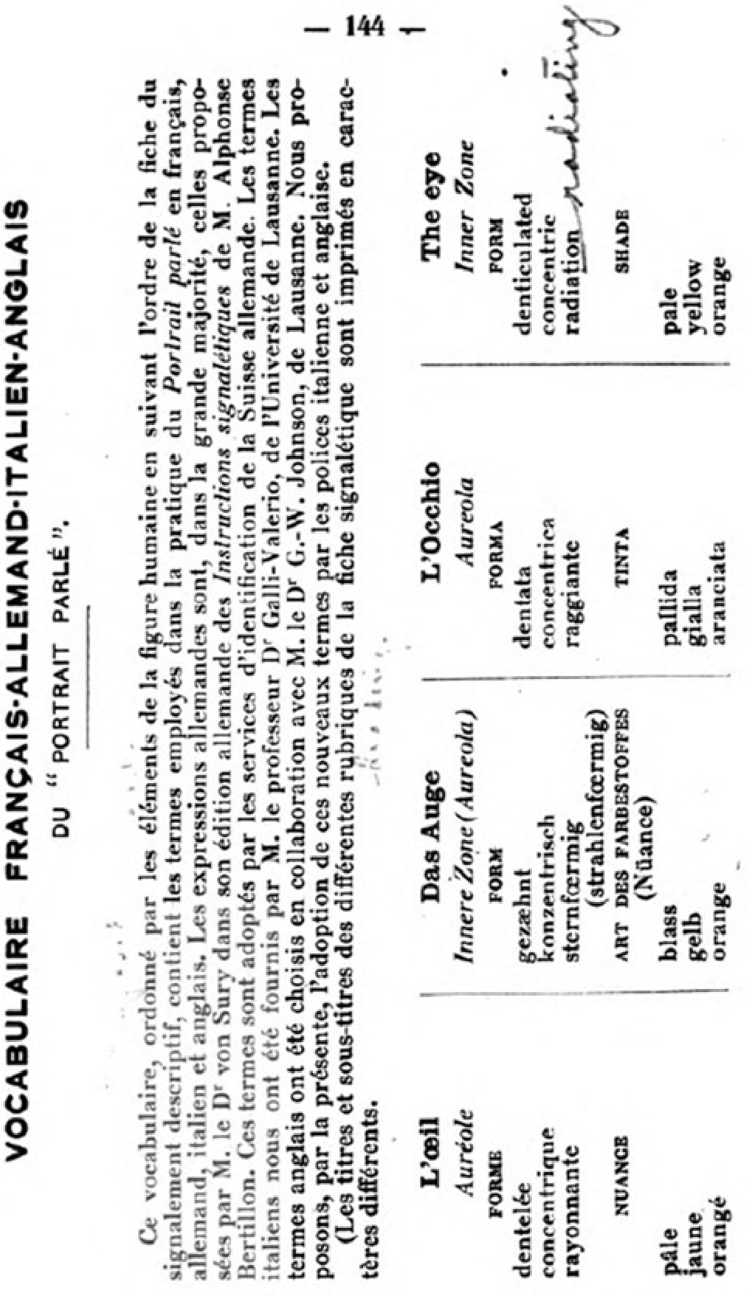
The peculiar lexicons of the police record: nouns with their adjectives, abbreviations, and ideograms. J. Gabriel Ducry, Manuel-vocabulaire du "Portrait parle" (méthode Alphonse Bertillon) (Marseille, France: Moullot, 1909), 86.

Indeed, this preoccupation with language is visible even from the title page, before you open these police manuals which are strangely titled "vocabularies," "dictionaries," or "lexicons"[23] (Figure 44.2). They live up to their titles in their attempt to create a specialized police record language, where words are maximally and sharply descriptive by being purged of their vagueness and imprecision. For words have a big task—to describe ↳ p. 803

p. 804 ↳

so precisely as to be able to identify the individual criminal beyond a shadow of a doubt. The police record attempts no less than to create a one-to-one representation of a human being, a representation that can double as an identification tool. This is no easy task, as words tend to do a pretty poor job at one-to-one correspondence, and people tend to change over time; Bertillon is sharply aware of the problem. He dedicates a meditative chapter called "On the Descriptive Analysis of the Human Figure" to the problems of this representation, citing those who have faced the challenge before him, and whose achievements, while helpful, need to be pushed forward through Bertillonage: Adolphe Quetelet, with his invention of the average man, and “men of letters.”[24] As an answer, Bertillon-style manuals proposed the creation of a highly specialized police language that tried to muster all the descriptive nuances and power of everyday and literary language while shaving off the imprecisions. Thus the maddening lists of precisely mandated nouns and adjectives, as well as their tight pairings.

Figure 44.2



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VOCABULAIRE FRANÇAIS-ALLEMAND-ITALIEN-ANGLAIS

DU “ PORTRAIT PARLÉ ”.

Ce vocabulaire, ordonné par les éléments de la figure humaine en suivant l'ordre de la fiche du signalement descriptif, contient les termes employés dans la pratique du *Portrait parlé* en français, allemand, italien et anglais. Les expressions allemandes sont, dans la grande majorité, celles proposées par M. le Dr von Sury dans son édition allemande des *Instructions signalétiques* de M. Alphonse Bertillon. Ces termes sont adoptés par les services d'identification de la Suisse allemande. Les termes italiens nous ont été fournis par M. le professeur Dr Galli-Valerio, de l'Université de Lausanne. Les termes anglais ont été choisis en collaboration avec M. le Dr G.-W. Johnson, de Lausanne. Nous proposons, par la présente, l'adoption de ces nouveaux termes par les polices italienne et anglaise.

(Les titres et sous-titres des différentes rubriques de la fiche signalétique sont imprimés en caractères différents.)

L'œil	**Das Auge**	**L'Occhio**	**The eye**
Auréole	*Innere Zone (Aureola)*	*Aureola*	*Inner Zone*
FORME	FORM	FORMA	FORM
dentelée	gezæhnt	dentata	denticulated
concentrique	konzentrisch	concentrica	concentric
rayonnante	sternfœrmig (strahlenfœrmig)	raggiante	radiation radiating
NUANCE	ART DES FARBESTOFFES (Nüance)	TINTA	SHADE
pâle	blass	pallida	pale
jaune	gelb	gialla	yellow
orangé	orange	aranciata	orange

Multilingual Dictionary attached to Police Manual: “Eye. Denticulated.” R. A. Reiss, *Manuel du portrait parlé (méthode Alphonse Bertillon) à l’usage de la police, avec vocabulaire français, allemand, italien et anglais, et code télégraphique du portrait parlé* (Paris: Roustan, 1914), 144.

This proliferation of words in the “spoken portrait” appears all the more baffling in the wake of photography’s momentous emergence in the mid-nineteenth century. For if an image is worth a thousand words, how many more words would a photograph—that unprecedentedly detailed and accurate image—be worth for the purposes of police identification? Who needed Bertillon’s “spoken portraits” when by his own admittance the Parisian police had photos of 90,000 criminals at the time he was writing, in 1895? Well, it turns out that photography was a great tease for nineteenth-century policing. Writing on this subject, both Alan Sekula and Tom Gunning have seen photography as playing two distinct, often opposing roles in relationship to modernity. On the one hand, photography was, as Sekula memorably put it, “modernity run riot.”[25] Photography illustrated and accelerated the problems of identity that haunted the modern metropolis, by divorcing images from their referents, be it in the postcards that circulated images of exotic places and peoples, in the mortuary portrait or, most alarmingly, in the false identity card. As Jonathan Crary has argued, photography “reshaped an entire modern territory” on which “signs and images, each effectively severed from a referent, circulate and proliferate.”[26] Opposing this view of mechanical reproduction and multiplication of photographic images that “undermined traditional understanding of identity, within the practice of criminology and detective fiction the photograph could also be used as a guarantor of identity and as a means of establishing guilt and innocence.”[27] In the practice of police photography, the unruly image would ideally be tamed in order “to facilitate the arrest of its referent,” “tying the separable image back to its bodily source.”[28] How was this to be accomplished? Police p. 805 departments had indeed very quickly picked ↳ p. 806 ↳ up on the potential of photography for identification, but they also soon ran into problems. Instead of doing away with the need for “spoken portraits,” these thousands of photographs posed a problem that triggered Bertillon’s invention of the “spoken portrait.” This sea of photographs paralyzed the agent faced with a repeat flesh-and-bones criminal, not to mention with thousands of potential criminals in the crowd. How was he or she supposed to find the one photograph taken during a previous arrest amid the thousands in the archives if the criminal did as little as give a false name? The links between referent/criminal, name, and image were severed in a metropolis that teemed with fake identities, fugitives, transplants, nomads, immigrants, and other suspects. Photography was indeed called upon to restore those links in the mugshot, but the more mugshots were taken, the more the confusion in the police archives grew.

Here is where Bertillon intervened. He was intent on restoring that link between image, (im)proper (fake) name, and referent/criminal. The test of his whole system rested on whether this humble clerk could identify a disguised repeat criminal among the thousands of mugshots held in police archives. It took him years. To reach his goal, he standardized the motley criminal pictures into the carefully measured standardized profile and frontal shots which he first called stereometric portraits and which we have since taken to calling mugshots. But these modern mugshots did not replace either the spoken portraits or the anthropometric measurements. On the contrary, their functioning was predicated on their precise linking to the verbal and numerical representations of the criminal, as represented by the Bertillon system police record sheet, which contains on one page all these different mediums. The logorrhea of the spoken portrait and the obsessive precision of anthropometric measurements were not superseded by the proliferation of photographs in the police archives. If anything, they grew. As the modern photographic image made its entrance into policing, language doubled its forces to rein it in.

The mugshot then neither supplanted language nor just added one more medium to the standard police record. Instead, the mugshot was extensively marked by words and figures, and worked only in conjunction with them. Moreover, these visible markings were just the tip of the iceberg of an elaborate system of description that translated the visual into language, a system rooted in a multisensory, yet still language-dominated, theory of memory:

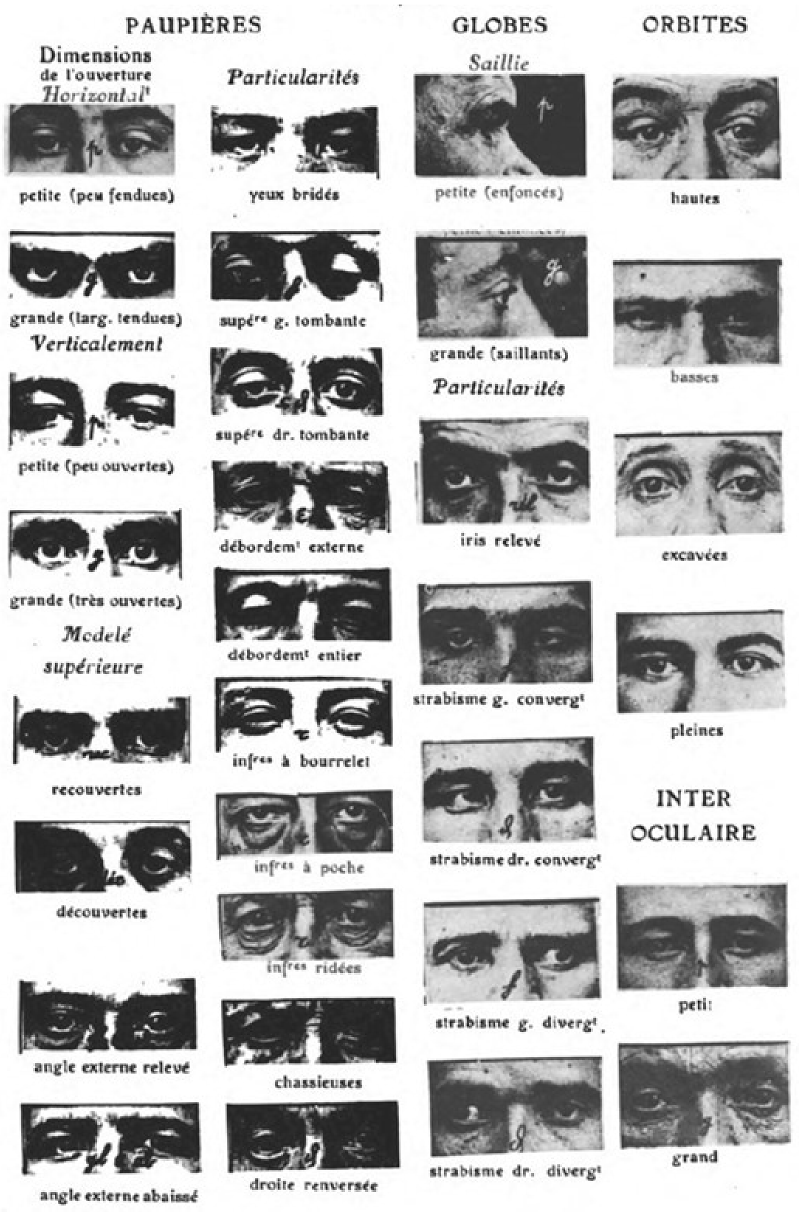
> This image, this visual document (*document visuel*) will not manage to register itself in the brain except to the extent that this organ will be equally capable of imprinting the traits and characters both by optical memory and by language. Modern psychologists teach us that the memory of an

> object is composed of the result of the visual, chromatic, tactile and auditory impression. ... In the same way we will say that as long as a distinguishing characteristic of external anatomy that could on its own distinguish an individual among thousands has not received a name which allows it to be stored in the memory ... it will remain as if unperceived and as if nonexistent. This has been said a long time ago: we don't think but what we can express through words. The same happens with sights: we cannot re-view in our mind that which we cannot describe.[29]

p. 807 Exposed at length in the manuals, this system of describing informs each carefully chosen abbreviation marked on the mugshot, its written marks as well as all its precise dimensions, the carefully measured positions of the bodies of suspects and photographers, the time of the day and amount of light to be allowed in. It also informs, most importantly if least visibly, the strategies of looking at the photos and at other humans, without which, Bertillon never tires of reminding his readers, the whole system founders, as the 90,000 photographs capturing all of Paris's criminal population remain illegible.[30] His disciple Ducry had learned the lesson: "The photographic portrait will become a research and identification instrument that is more efficacious the more the agents will be familiar with the way of using, analyzing, describing, knowing it by heart, extracting in one word, everything that one can extract: since we must, in order to see (*voir*) well or even better to perceive (*percevoir*) well what one sees, know in advance which are the points to 'watch' (*regarder*)."[31]

While the striking pages of collated noses, ears, chins, and eyes can easily mislead us into believing in the primacy of the visual in the early police record, from its very first page the record in fact more accurately frames the picture within the textual and numeric mediums it functioned in. At a closer view, even the decontextualized photographs carry the reminders of their intermedia functions. First, each photo comes elaborately filed in albums, categorized according to words naming shapes, colors, and sizes. Furthermore, even on the photograph itself, a close look reveals a plethora of information written in initials and abbreviations. (Figure 44.3). These were not accidental markings: the list indicating the kind of information that should be marked on the photographs itself takes more than one page, and it includes nuances of the left iris, beard, hair, and indications as to the details of the ears, nose, eyes, that would not be visible with the naked eye on the photo.[32] The results are strikingly marked criminal faces, with incomprehensible "tattoos" in clerkish calligraphy. The photograph is an intermedia artefact through and through: on its surface, in its carefully measured dimensions, in its framing within the record, and in its reception by the agent carefully trained in the art of viewing, reviewing, recognizing, and describing.

Figure 44.3


PAUPIÈRES
Dimensions
de l'ouverture
Horizontal^t
petite (peu fendues)
grande (larg. fendues)
Verticalement
petite (peu ouvertes)
grande (très ouvertes)
Modelé
supérieure
recouvertes
découvertes
angle externe relevé
angle externe abaissé
Particularités
yeux bridés
supé^re g. tombante
supé^re dr. tombante
débordem^t externe
débordem^t entier
inf^res à bourrelet
inf^res à poche
inf^res ridées
chassieuses
droite renversée
GLOBES
Saillie
petite (enfoncés)
grande (saillants)
Particularités
iris relevé
strabisme g. converg^t
strabisme dr. converg^t
strabisme g. diverg^t
strabisme dr. diverg^t
ORBITES
hautes
basses
excavées
pleines
INTER
OCULAIRE
peti:
grand

Marked up photographs: Eyes, J. Gabriel Ducry, *Manuel-vocabulaire du "Portrait parle" (méthode Alphonse Bertillon)* (Marseille, France: Moullot, 1909), Plate XIII.

There were fantasies of trading all this wordy and shady mess for clean combinations of the ten digits —"the measurement in centimeters is preferable to the most perfect vocabulary," Bertillon sighs.[33] A disciple, R. A. Reiss, even proposes to translate the spoken portrait into numeric codes, reaching out to our computerized future.[34] But at the time, these were just dreams, and they remained based on the messy words and images coded in the figures. So the imperfect solution was to stick to words, and continue to pile up more and more precise adjectives, and then take clearer images. Finally, if the mental representation still did not fully yoke the image to the verbal, the agent needed to get to work on yoking image and words by intermedia ropes. Or more likely, the threads that bind these intermedia files, the staple that brings together p. 808 the photo and the writing paper, the ink mark on photo paper, the measuring tape that leaves its ↳

p. 809 ↳

shadow everywhere, seen or unseen. We've seen these manual-dictionaries translate everyday and literary language into police language; French to myriad other languages; language to code. Yet their foundational translation operated from visual to verbal.

In the police record, word, image, and number were called upon to tie together the shifty human figure into an unmoving representation that could double as identification. The marked-up mugshot was attached to the spoken portrait, both filed and at the ready to capture its referent in their intermedia net. As pioneers like Alan Sekula, Christian Phéline, and others more recently have brilliantly shown, photography was a crucial medium of the modern police file, shaping it from its birth.[35] Yet I believe it is important to remember, as these peculiar words often fade into their crowded acronyms, while the photographs catch our attention through their striking black and whiteness, that the system was intermedia and language-dominated. So in the second part of the article we will turn to the less visible but highly influential textual genres that shaped the modern police record: biography, confession, the detective story, and the novel. However, before moving on, it seems important to note that the particular intermedia net created to capture identity in the police record did not remain restricted to its original criminal subject but was expanded for use regarding a variety of populations—nomads, migrants, foreigners, workers, the colonized, and even the "picturesque" of anthropological studies.[36]

44.2 The Long Shadow of Bertillon's Police Records: National and Colonial Biopower

As mentioned before, Bertillonage did not develop in isolation but in synergy with the culture and politics of its time. For example, the commerce between early policing and anthropology was neither accidental nor unnoticed. On the contrary, Bertillon acknowledged his debt to the social sciences, "especially Anthropology," in tackling the great challenge of representing identity.[37] He was particularly interested in

anthropometry and took pride in the adaptation and improvements he brought to contemporary ↳ practices. He also advertised "new formats, poses and scales," which he prescribed for judicial photography for the use of "amateur photographers" interested in "ethnic, professional, or picturesque types," and particularly recommended the conventions of the mugshot—its right profile, frontal shot, and strong links to anthropometrics, to "anthropologists," so that they would forge a common scientific language.[38] The latter did not wait long to give course to this invitation. The mugshots and anthropometric measurements taken during an 1895 French anthropological expedition to study Kurdish people closely echo Bertillon's language:

> The general physiognomy and morphology of an individual, of a family, or of a race can without a doubt be established through direct observation and can be described with the help of qualifications, as well as by numerous photographs all taken with the same aspect—that is to say —frontal or head on—and profile of well-chosen subjects. Yet these documents, which must be thought of as indispensable, would remain incomplete if not accompanied by multiple and rigorous measurements. The proportions of the body, the shape of the eyes, of the nose, of the face, and of the head in general, can only be known and studied thanks to anthropometric research.[39]

Note how seamlessly the transition from individual to family group to race occurs in one introductory sentence that sets the assumptions. Then visual observation, verbal description, and anthropometric measurement are also seamlessly yoked here in capturing the human subject together. Any one of them taken in isolation would fail at its task; hence the records are necessarily intermedia. Their creation necessitates the coordination of a whole *dispositif* of technologies from writing (describing, labeling, indexing), to photography, to the tools of anthropometry—such as calipers and measurement tapes. Indeed, in a document titled "For the Use of Travelers and Residents in Uncivilized Lands, the first two items recommended for the traveler were "1. Calipers … 2. Measuring tapes … several should be taken, as they are soon rendered illegible by the grease and filth of the subjects measured."[40] Soon they were to be paired with a camera fitted with a "dummy lens" to distract the "camera shy natives" who also "regarded physical measurements almost invariably with suspicion."[41] In *Kurdistan: In the Shadow of History*, Susan Meiselas shows the resulting mugshot-like pictures (face and profile pairs), taken in 1890–1894 during anthropometric expeditions led by Ernest Chantre, future author of the book, *Kurdes* (1897), a close p. 811 contemporary of Bertillon's ↳ writings.[42] These anthropological mug shots were still highly sought after in 1934, when a plan for a Field Museum expedition notes the excitement at the ability to photograph and measure women given the participation of a female anthropologist, Winifred Smeaton, "qualified to do anthropometric work."[43]

Technologies honed to capture the figure of the repeat criminal (recidivist) by the police file have been appropriated for a variety of other purposes. There was an easy transfer back and forth from the anthropometric measurement of criminals to the anthropometric measurements of foreign populations or racial types as done by anthropologists and colonial powers—sometimes hand in hand. In "Indigenous Identities and Colonial Police," Ilsen About shows how the introduction of specialized police services for identification, particularly in Algeria, "was not just aimed at reinforcing the identification of suspects and of criminals in order to improve the repression of criminality, but it was equally a central stage in the toughening of security policies imposed on indigenous populations."[44] The development of police identification as standardized through Bertillonage is an integral part of "a history, largely unwritten, of the French involvement in the forceful definition of indigenous identity."[45] Identification appears here as the fulcrum on which the language of the police file turns from its touted recording role to an Austinian performative role. Rather than just recording individuals at a particular time and place in their lives, the police file appears interested in fixing identity. This was already the case in the attempt to overcome the variety of disguises and temporal changes of the Parisian suspect to create the identifying card of the *recidiviste*, "the repeat criminal." The link between identification and identity formation, already visible in the first Bertillon manuals, takes off in the colonies, where whole new taxonomies appear.[46] Some will be imported back to the metropolis. In Indochina and Maghreb, multiple types of personal identity cards appear and prefigure the forms of personalized control applied to foreigners in interwar France.[47] Police officers from Mexico to Maghreb to Indochina argued that Bertillon-style identification should be adopted to assist with their oft-mentioned difficulty of reading "the indigenous race [composed] of individuals of uniform and little varied type."[48] Once again, Bertillonage was appropriated not just as a technology of taking mugshots or spoken portraits or anthropomorphic measurements but also as a technique of reading a reality that proved a challenge to the untrained eye. Indeed, it is not accidental that even before their p. 812 generalized ↳ acceptance in France and Europe, Bertillon's identification files were rapidly disseminated in the colonies and in Latin America.[49]

Similarly, it is fitting that the technology that finally superseded the complications of Bertillonage—the fingerprint—was rooted in colonialism, and then exported back to Europe.[50] In famously arguing for the scientific basis and utility of fingerprinting in front of the Anthropological Society in 1889, Francis Galton went back in great detail to the colonial administrator's vision difficulties in "distinguishing Indian natives' features." He then added, "Whatever difficulty may be felt in the identification of Hindoos is experienced in at least an equal degree in that of the Chinese resident in our colonies and settlements, who to European eyes are still more alike than the Hindoos, and in whose names there is still less variety."[51] Fingerprinting was proposed as a solution to this visual disorder rampant in colonialism—the inability to read and distinguish different faces, or human illiteracy. Indeed, as Simon Cole shows in his history of fingerprinting, Galton "did not conceive of fingerprinting as replacement for Bertillonage," which is in fact what was to happen. "He strongly believed that Britain should adopt the Bertillon system. Instead, he viewed fingerprinting as a tool for colonial governance."[52] However, just as judicial photography, anthropometric measurements, and spoken portraits easily spread from the representation of criminals to that of nomads, migrants, workers, travelers, and finally, to anyone carrying a passport or identity card, so the fingerprint, first tried on Bengali workers, came to identify European criminals, and in its latest uses in border control, any citizen in transit.

44.3 The Police File, the Detective Story, and the Novel

Despite its peculiar identifying marks—fingerprints, anthropometric measurements, standardized language—the police file is a genre with permeable boundaries. While its changing shape has been strongly influenced by shifting political, cultural, and scientific climates, it also developed in close relationship to other genres of writing, such as the detective story, the novel, and biography.[53] It will come as no surprise that of all literary p. 813 ↳ writing, the modern police file is most closely related to the detective story. Criminology, the genre of detective fiction, and even the word "detective" emerged in the West around the same time, the middle of the nineteenth century. There are many theories as to why this sudden need arose for the word in the English language, as for the genre in general.[54] As we have seen, the challenge of identification posed by unprecedented urbanization, migration, and the anonymity of the modern crowd is a recurring theme in the literature. Carlo Ginzburg has memorably argued that there are also underlying similarities between the logic of the detective story and criminology in their attraction to the conjectural paradigm—their reliance on a science of reading seemingly insignificant details/clues in a world where deceiving appearances challenge straightforward sense-making.[55] Set in nineteenth-century Paris, Edgar Allan Poe's "The Murders in Rue Morgue," the short story that is canonically considered the first of the genre, contains long, pretend ad litteram quotations from the contemporary Parisian police file dealing with the identification of the criminal.[56] Presumed to be "a foreigner," maybe "a woman" by all the witnesses who hear voices through the walls, the murderer turns out to be the ultimate other, an orangutan from the colonies.[57] Symptomatically, the first Western detective story's victims were female, the murderer was a beast from the colonies, and the police files struggled with identification and needed special reading "acumen."[58] Indeed, the quotations from the files only bewilder the uninitiated reader through the utter cacophony of the witness testimonies—"Was certain it was not French. Could not be sure it was a man's voice. It might have been a woman's." "Was convinced by the intonation that the speaker was an Italian."[59] "Is sure that it is not the voice of an Englishman. Appeared to be that of a German."[60] "The shrill voice was of an Englishman—is sure of this." "Thinks it the voice of a Russian."[61] The quotation from the police file is then already a key stylistic and plot device, one that signals the authority and power of the narrator and of his detective to access the confounding information and to perform a knowledgeable reading. Significantly, the first detective story is a lesson in reading the police files of its time. This is not unique to Dupin, Poe's detective. p. 814 ↳ Sherlock Holmes, the other early hero of the genre, shows standard contempt for policemen; yet when in a pinch, he does productive research in police archives.[62] Once again, he manages to decipher in the police files the key to the mystery that the police themselves fail to see. As Bertillon knew, detecting was evidently not just about creating and archiving the files but also developing particular methods of reading and sense-making. These special reading methods, whether they are called Bertillonage, Ginzburg's conjectural method, Poe's acumen, or Conan Doyle's science of detection, come with convoluted theories and practices, for nothing was what it seemed any longer. The relationship between words, images, and the peculiar referent they had the job to not just represent but also identify—the criminal—had itself become highly suspect.

If the police file standardly uses different mediums and disciplines to reinforce each other in their identification of the criminal, literature was more open to probe the disjunctions and complexities in these intermedia portraits. A case in point is modernist master Alfred Doblin's experimental literary cases of women and crime in Weimar Germany.[63] Indeed, as Simon Stern notes, "a series of books published in Weimar Germany featured true-crime narratives that mined the actual case files, combining an array of visual and documentary materials."[64] In analyzing one such case study of two women accused of lesbianism and murdering their husbands, Lewis shows how Doblin used images and graphs (placed in an envelope affixed with glue to the cover of the book as an addendum), as well as the psychoanalytic case study genre as a whole, not to authenticate the police indicting caricature of the women but rather to complicate their portrait.[65] His intermedia addendum draws attention both to the limits of the legal representations of the suspects and to his own literary representation within his own more traditional textual narrative. The intermedia aspect of the files was has also been appropriated by writers to attract their audiences to a more interactive readership model. Thus, the United States saw the emergence of the crime-file genre in the 1930s, whereby writers presented their detective fiction in the form of police case files. Bound in paperboards with a cord binding, these dossiers, "artefacts rather than books," included actual clues, such as cigarette stubs, a bloodstained section of curtain, phials of medicine and perfume, and of course, photographs.[66] Tellingly, the analyses of these p. 815 ↳ literary appropriations of police files all underscore their emergence at a time when not just the representation of the criminal but also literary representation finds itself in crisis; thus its attraction to borrowing not just plots but also formal devices from other mediums and discourses.[67]

To a certain extent, the longer forms such as the novella or novel expanded and nuanced this crisis of representation. Another related, if distinctly articulated, problem that is introduced through the relationship between literary and police writing is the question of complicity and subversion.[68] Probably the most well-known study on the novel in this context is D. A. Miller's *The Novel and the Police*.[69] Miller's argument is a long development of Michel Foucault's thesis, in "The Lives of Infamous Men," that "literature forms part of that great system of constraint by which the West compelled the everyday to bring itself into discourse."[70] In his close analysis of nineteenth-century British novels Miller aimed to demonstrate how "the most unsayable, the most secret, the most intolerable, the shameless," was brought to light and exposed in the novel.[71] As such, the novel appears in Miller's reading as a more insidious extension of the police file. At the opposite end of the spectrum in his assessment of the novel's relationship to authoritative discourse stands Mikhail Bakhtin, whose "Epic and the Novel" seminally cast the novel as a dialogic and open form.[72] Beyond any simplified black-white verdicts on the relationship between the novel and policing, however, what Bakhtin offered us was a dynamic understanding of the relationship of literary and extra-literary discourses—such as the novel and the police file, where "the boundaries are not laid up in heaven," but instead there is a lot of overlap, borrowing, influence, and appropriation.[73] My chapter is tributary to this dynamic and dialogic understanding of genre, while extending it to the question of p. 816 medium. ↳ In so doing, it responds to a growing preoccupation with the role of the visual and media archeology in law and criminology.[74]

44.4 The Police File and Biography

The defining preoccupation with identification in the modern police file should not blind us to its other ambitions. Some of the earliest police records preserved were indeed less interested in capturing a criminal/suspect, as the criminals were already imprisoned, or were subject of long-term police surveillance. This is the case of documents published by Michel Foucault and Arlette Farge, documents from seventeenth- and eighteenth-century archives, including the Bastille archives.[75] As Foucault notes, these records give sketchy elements toward biographies that, had it not been for their subjects' encounter with the law, would never have been written.[76] Robert Darnton's illuminating study of some of the earliest surveillance files on intellectuals during pre-Revolutionary France, a time where the very category of intellectuals was being formed, also shows police files that spent little time on identification and much of their time on the story (*histoire*) of the subject.[77] The police inspector, d'Hémery, "used standard forms—large folio sheets with six headings printed in bold type: name, age, birthplace, description, address, and *histoire. …* The rubric *histoire* provided the most room for situating the writers, and d'Hémery accorded it the largest space on his printed forms."[78] Darnton notes that "[t]he files contain as many remarks about the quality of the authors' style as about the character of their religious and political opinions," showing a "combination of literary sensitivity and bureaucratic orderliness that would be unthinkable in most police headquarters today."[79] The *histoire* often included rich diachronic detail as well as characterization, which again brings it closer to the genre of biography.

This is not surprising but rather is in line with a penchant for biography that is discernible at certain moments in the history of Western criminology. The great reform of the modern penitentiary, which originated in eighteenth-century England, "aimed to p. 817 ↳ reshape the life story of each criminal by the application of pleasure and pain within a planned framework. … Their aim was the reformation of character through the controlled alteration of material circumstances through time."[80] As a result, criminologists and other penitentiary reformers became extremely interested in recording and rewriting the story of a criminal life. Whether they posited their subject as an inborn criminal, a victim of the modern environment, or a free-willing delinquent, the major schools of nineteenth-century criminology had recourse to various narratives—ranging from genealogies to sociologically or psychologically inclined biographies—to express their views of the criminal.[81]

However, this biographical interest that sometimes informs Western criminological treatises or penitentiary reform programs is less visible in the more applied genre of the police file, which was mainly used as a practical tool in actual police searches for the perpetrators of particular crimes. Indeed, throughout the nineteenth and twentieth centuries, the Western police file was increasingly developed as a technology of identification: the file aimed to capture not the detailed story of the criminal, his or her genealogy, life conditions, or psychological development, but rather the identifying characteristics of the individual body. This gradual turn away from biography in the modern Western police file is particularly salient in contrast with the direction taken by a powerful offshoot of the genre, the Soviet-era secret police personal files, in wide use throughout Eastern Europe, Russia, and Central Asia. As I have shown in detail in *Police Aesthetics*, whereas Western twentieth-century criminal records are usually limited to the investigation of a particular crime, the Soviet personal file is typically concerned with the extensive biography of the suspect.[82] Nicolae Steinhardt summarized this condition: "you are not accused for what you have done, but rather for who you are."[83] In the Soviet bloc the secret police file programmatically developed as a biography that shadowed and often took over the actual life of the subject, unlike the identification-driven Western police record.

p. 818 The opposite trend away from biography is visible in the development through time of a defining rubric of the Western police file, the distinguishing characteristics. In the nineteenth century, under the influence of phrenology and physiognomy, descriptions of the criminal often tried to link certain body characteristics to character (such as a certain skull shape with degeneration or criminality). With the adoption of the Bertillon system throughout Europe at the end of the nineteenth century, body markers were no longer recorded in the police file with the expectation that they could reveal anything about the character; instead, they were chosen for their ability to distinguish one person from another.[84] The classic apex of this development is the fingerprint, undoubtedly the chief identifying feature throughout the twentieth century. Among newer technologies, iris scans provide a particularly fit illustration of this trend from symptomatic to synecdochic readings of the body's distinguishing characteristics. The eye, traditionally seen as the window to the soul, is no longer probed for any clue about character. Instead, the eye is chosen as a site, analogous to the fingertip, where random peculiarities of shape and color converge to create unique patterns that distinguish each individual from others in what Allan Sekula memorably described as the modern body archive.[85]True to its original Bertillon model, the modern Western police file largely steered clear of biographical ambitions at recording or rewriting individual biographies. Rather than biography, it had a deeper kinship with a closely contemporary genre: detective fiction. They emerged at the same time, in the second half of the 19th century, and shared a preoccupation with identifying the elusive criminal in rapidly modernizing metropoles and colonies. Unlike the detective story, however, the police file developed as a fundamentally intermedia toolkit of identification. Its tools (the mugshot, the fingerprint, the iris scan) easily spread back and forth from its original subject—the repeat criminal—to colonial subjects, minorities, migrants, and lately, all the way to the general population.

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Notes

[1] Dick Higgins, “Intermedia” (1965, 1981), *Leonardo* 34, no. 1 (2001): 49–54.

[2] It is impossible to overestimate the importance of the new legislation against repeat criminals, or recidivists, as a catalyst for identification and Bertillonage. See, for example, Pierre Piazza, “Les recidivists en fiches,” in *Aux origines de la police scientifique: Alphonse Bertillon, précurseur de la science du crime*, ed. Pierre Piazza (Paris: Karthala, 2011), 26-49.

[3] Higgins was aware of Coleridge, and referenced him. Higgins, “Intermedia,” 52.

[4] Samuel Taylor Coleridge, “Literary Remains: Coleridge on Spenser,” 4 vols., *Literary Remains of Samuel Taylor Coleridge*, ed. Henry Nelson Coleridge (1812), http://spenserians.cath.vt.edu/TextRecord.php?action=GET&textsid=35813.

[5] Ibid.

[6] Mark Maguire, “The Birth of Biometric Security,” *Anthropology Today* 25 (2009): 9–14.

[7] Walter Benjamin, *Charles Baudelaire: A Lyric Poet in the Era of High Capitalism* (London: Verso, 1983), 43.

[8] New preoccupation and laws regarding repeat offenders—recidivists—further increased the importance of identification and the imperative that it function irrespective of the effects of time over the human body.

9 In 1895 Bertillon boasted that his methods had also been adopted as far as "Russia, the US, Argentina, and Tunisia." Alphonse Bertillon, *La photographie judiciaire* (Paris: Gauthier-Villars, 1890), 2. A Bertillon-style manual was published in Spanish in Santiago de Chile as early as 1900 and adapted for use in the colonies. Pedro N. Barros Ovalle, *Manual de antropometría criminal i jeneral, escrito según el sistema de A. Bertillon* (Santiago de Chile: Blanchard-Chessi, 1900). His work had also been translated into English and published in the United States and Canada as early as 1896. Alphonse Bertillon, *Legal photography*, trans. Paul R. Brown (New York, 1897); *Signaletic Instructions* (New York: Werner, 1896).

10 *Photographie judiciaire*, 3.

11 J. Gabriel Ducry, *Manuel-vocabulaire du "Portrait parlé" (méthode Alphonse Bertillon)* (Marseille, France: Moullot, 1909), 6.

12 For a fascinating argument about the emergence of a conjectural mode in the decades between 1870 and 1890, see Carlo Ginzburg, "Morelli, Freud, and Sherlock Holmes: Clues and the Scientific Method," in *The Sign of Three: Dupin, Holmes, Peirce*, ed. Umberto Eco and Thomas A. Sebeok (Bloomington: Indiana University Press, 1983), 81–118. Ginzburg argues that this common semiotic was based on the reading of accidentally left traces/clues in psychoanalysis, detecting, and art connoisseurship.

13 Henry Rhodes, *Alphonse Bertillon* (London: Harrap, 1956), 27; Max H. Houch, *Forensic Science* (London: Praeger, 2007), 24.

14 His most infamous mistake (in the expert testimony he offered on the handwriting of Alfred Dreyfus, a testimony which contributed to the latter's unjust sentence) was also directly linked to his preoccupation with records. Roger Mansuy and Laurent Mazliak, "L'affaire Bertillon," in *Aux origines de la police scientifique*, ed. Pierre Piazza (Paris: Karthala, 2011), 349–372.

15 Houch, *Forensic Science*, 27.

16 See for instance Diego Galeano and Mercedes Garcia Ferrari, "Cartographie du bertillonage. Le système anthropometrique en Amérique Latine: circuits de diffusion, usages et résistances," in *Aux origines de la police*, ed. Pierre Piazza (Paris: Karthala, 2011), 308–331.

17 In fact, Houch attributes the decline of the Bertillon method not just to the usual explanation of its supplanting by fingerprint identification, but also to the inability of the masses of police agents to replicate Bertillon's overly exacting prescriptions. Houch, *Forensic Science*, 27.

18 Ducry, *Manuel-vocabulaire*.

19 Ibid., 11–14.

20 Ibid., 11.

21 Ibid.

22 Ibid., 47–52.

23 Ibid.; R. A. Reiss, *Manuel du portrait parlé (signalement) (méthode Alphonse Bertillon) à l'usage de la police, avec vocabulaire français, allemand, italien et anglais, et code télégraphique du portrait parlé* (Paris: G. Roustan, 1914). One of the first English translations of *Instructions signalétiques* emphasized this focus on verbal descriptions to the point of changing the title: Alphonse Bertillon, *Alphonse Bertillon's Instructions for Taking Descriptions for the Identification of Criminals, and Others* (Chicago: American Bertillon Prison Bureau, 1889).

24 "Analyse descriptive de la figure humaine," in *La photographie judiciaire* (Paris: Gauthier-Villars, 1890), 81–104.

25 Allan Sekula, "The Body and the Archive," *October* 39, no. 4 (1986): 3–64, 4.

26 Jonathan Crary, *Techniques of the Observer: On Vision and Modernity in the Nineteenth Century* (Cambridge, MA: MIT Press, 1990), 13.

27 Tom Gunning, "Tracing the Individual Body," in *Cinema and the Invention of Modern Life*, ed. Leo Charney and Vanessa Schwartz (Berkeley: University of California Press, 1995), 15–45, 19.

28 Sekula, "Body and Archive," 7; Gunning, "Tracing the Individual Body," 19.

29 Bertillon, *Photographie judiciaire*, 36.

30 Ibid., 104.

31 Ducry, *Manuel-vocabulaire*, 3.

32 Ibid., 63–64.

33 Bertillon, *Photographie judiciaire*, 88.

34 See "the telegraphic code of the spoken portrait." Reiss, *Manuel du portrait parlé*, 165.

35 Christian Phéline, *L'image accusatrice* (Laplume, France: Association de critique contemporaine en photographie, 1985); Sekula, "Body and Archive." Furthermore, Sekula makes the important argument that photography's involvement with the police has long been a repressed foundational chapter in the history of photography, the negative of the ceremonial bourgeois portrait.

36 For instance, "the anthropometric notebook for nomads," targeting Roma populations in France, "was inscribed as a prolongation of the methods and procedures that Bertillonage imposed on criminals starting with 1880." Emmanuel Filhol, "Le carnet anthropométrique des nomades," in *Aux origines de la police scientifique*, ed. Pierre Piazza (Paris:

Karthala, 2011), 247–274, 249. When the law for the registration and identification of nomads was passed in France in 1912, Bertillon was immediately named part of a commission to see to its application.

37 Bertillon, *Photographie judiciaire*, 4.

38 Ibid., 4–5.

39 Ernest Chantre, *Missions Scientifiques en Transcaucasie, Asie Mineure et Syrie 1890–1894*, vol. 6 (Lyon: Georg, 1895), x, https://gallica.bnf.fr/ark:/12148/bpt6k57465931/f18.item.r=indispensable (quoted in Susan Meiselas, *Kurdistan: In the Shadow of History* (Chicago: Chicago University Press, 1997), 8).

40 Dr. Beddoe, F. R. S., “For the Use of Travelers and Residents in Uncivilized Lands,” in *The Notes and Queries on Anthropology* (London: Royal Anthropological Institute, 1874) (quoted in Meiselas, *Kurdistan*, 4).

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42 Meiselas, *Kurdistan*, 7–9.

43 Ibid., 168.

44 Ilsen About, “Identités indigènes et police coloniale: L’introduction de l’anthropométrie judiciaire en Algérie, 1890–1910,” in *Aux origines de la police scientifique*, ed. Pierre Piazza (Paris: Karthala, 2011), 280–302, 281.

45 Ibid., 280.

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47 About, “Identités indigènes et police coloniale,” 281.

48 Galeano and Ferrari, “Cartographie du bertillonage,” 314.

49 Ibid., 326.

50 For the fascinating history, see Chandak Sengoopta, *Imprint of the Raj: How Fingerprinting Was Born in Colonial India* (London: Macmillan, 2003).

51 Quoted in Simon A. Cole, *Suspect Identities: A History of Fingerprinting and Criminal Identification* (Cambridge, MA: Harvard University Press, 2001), 76.

52 Ibid., 77.

53 This is certainly not an exhaustive list of literary genres that have a deep relationship to the police file. For instance, autobiography and confession are extremely important in this context, and have been well studied. See, for example, Peter Brooks’s classic, *Troubling Confessions: Speaking Guilt in Law & Literature* (Chicago: University of Chicago Press, 2000). For a thought-provoking book that spans comparative analysis of Dostoyevsky’s use of false confession and confession in American jurisprudence, see Amy D. Ronner, *Dostoevsky and the Law* (Durham, NC: Carolina Academic Press, 2015). Attention also deserves to be paid to mutual influences with other legal genres, such as Andrew Benjamin Bricker’s chapter, “The Functions of Legal Literature and Case Reporting Before and After *Stare Decisis*,” in this volume, presented in a richly layered historical exposé.

54 For a recent review of the different explanations with an accompanying bibliography, see Lisa Zunshine, *Why We Read Fiction: Theory of Mind and the Novel* (Columbus: Ohio State University Press, 2006).

55 Ginzburg, “Morelli, Freud, and Sherlock Holmes,” 88–101.

56 There are certainly precursors to the genre, such as Voltaire’s *Zadig* and the ancient Arabic stories that it is inspired from. For an illuminating discussion of a longer pre-history of the detective story, see ibid.

57 Edgar Allan Poe, “The Murders in Rue Morgue” (1841), in *The Complete Stories* (New York: Knopf, 1992), 483.

58 Indeed, the first three pages of the story risk losing their reader before the detective genre gets off the ground with an avowedly abstract theory of acumen, attention, and the kinds of mental features required for reading and disentangling the mystery to follow. Ibid.

59 Ibid.

60 Ibid., 484.

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65 “The impact of the additional, non-literary adjuncts is to overdetermine the myriad causal factors leading to the crime.” Lewis, “Döblin’s Literary Case Studies,” 168.

66 William Reynolds, “Seven ‘Crimefiles’ of the 1930s,” *Clues* 1 (1980): 42–53. This interactive and immersive function of the intermedia dimension of police files resurfaced in the 1980s practice of adding “feelies” to video game packaging. See Karhulahti Veli-Matti, “Feelies: The Lost Art of Immersing the Narrative” (paper presented at the International DiGRA Nordic Conference). I am grateful to Simon Stern for this reference.

67 Lewis argues that “literature faced challenges from many quarters, challenges that an empirical turn could not adequately address without a more radical reinvention of the parameters of literature itself.” Lewis, “Döblin’s Literary Case Studies,” 158. The subtitle of Herzog’s book, *Criminalistic Fantasy and the Culture of Crisis in Weimar Germany*, is also telling in this regard. Reynolds sees the “crime files” as an attempt to respond to the crisis of the mystery novel in the 1930s, when its days were “if not numbered, at any rate in the hands of the auditors.” Reynolds, “Seven ‘Crimefiles’ of the 1930s.”

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69 D. A. Miller, *The Novel and the Police* (Berkeley: University of California Press, 1988).

70 Michel Foucault, “The Lives of Infamous Men,” in *Power, Truth, Strategy*, ed. Meaghan Morris and Paul Patton (Sydney, Australia: Feral Publications, 1979), 91.

71 Ibid.

72 Mikhail Bakhtin, *The Dialogic Imagination*, trans. Michael Holquist and Caryl Emerson (Austin: University of Texas Press, 1981).

73 Ibid., 33.

74 For a review of the literature on the visual dimension of law and legal practice, media and crime, and visual criminology, see Ronnie Lippens, “Crime, Criminal Justice, and the Image,” *Visual Criminology* (2014), https://visualcriminology.com/about/. Among the helpful readers that span the diversity of these fields, see Costas Douzinas and Lynda Nead, *Law and the Image: the Authority of Art and the Aesthetics of Law* (Chicago: University of Chicago Press, 1999); Chris Greer, *Crime and Media* (London: Routledge, 2009); Keith J. Hayward and Mike Presdee, *Framing Crime: Cultural Criminology and the Image* (London: Routledge, 2010). See also related work: Carolin Behrmann’s chapter, “Law, Visual Studies, and Image History,” and Bennett Capers’s chapter, “Video as Text/Archive,” both in this volume.

75 Foucault, “Lives of Infamous Men”; Michel Foucault and Arlette Farge, *Disorderly Families: Infamous Letters from the Bastille Archives* (Minneapolis: University of Minnesota Press, 2016).

76 Foucault, “Lives of Infamous Men,” 79.

77 Robert Darnton, “A Police Inspector Sorts his Files: The Anatomy of the Republic of Letters,” in *The Great Cat Massacre and Other Episodes in French Cultural History* (New York: Vintage Books, 1985).

78 Ibid., 160–162.

79 Ibid., 157.

80 John Bender, *Imagining the Penitentiary* (Chicago: Chicago University Press, 1987), 22–23.

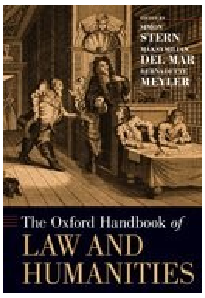
81 Peter Becker argues that in nineteenth-century Germany criminologists used biography to describe the *Gauner*, the professional criminal and volitional wrongdoer, and genealogies to describe the degenerate or inborn criminal. Peter Becker, “Criminological Language and Prose from Late Eighteenth to the Early Twentieth Century,” in *Crime and Culture: An Historical Perspective*, ed. Amy Gilman Srebnick and René Lévy (Aldershot, U.K.: Ashgate, 2005), 23–36, 32–33. Elsewhere in Europe, there seems to have been quite a mix of these narratives in criminological attempts to describe criminals. While theories of inborn criminality were ultimately superseded by more sociological approaches to crime, in practice there seemed to have been significant mixtures and dialogues between various criminological approaches. Thus Cesare Lombroso, the most famous proponent of the inborn criminality theory, confessed admiration for Alphonse Bertillon, the father of modern policing. Christian Phéline, “L’image accusatrice,” *Les Cahiers de la Photographie* 17 (1985): 72, 1–169. In some cases, one person could represent very different criminological trends, as in the famous case of Francis Galton, who was an early proponent of eugenics and also the inventor of the fingerprint. Sekula, “Body and Archive,” 34–50.

82 See Cristina Vatulescu, “Arresting Biographies: The Secret Police File in the Soviet Union and Romania,” in *Police Aesthetics: Literature, Film, and the Secret Police in Soviet Times* (Stanford, CA: Stanford University Press, 2010).

83 Nicolae Steinhardt, *Jurnalul Fericirii* (Cluj, Romania: Dacia, 1997), 240.

84 Sekula, “Body and Archive,” 30, 33–35.

85 Ibid., 10.



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